Supreme Court, U.S.
FILED

00-859 NOV 27 2000

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Respondent.

v.

MARK HENRY ALLERHEILIGEN,

Petitioner,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT L. POTTROFF #10220
Counsel of Record
MYERS, POTTROFF & BALL
320 Sunset Avenue
Manhattan, Kansas 66502
Telephone: (785) 539-4656
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

125pp

QUESTIONS PRESENTED

1. The Tenth Circuit's failure to consider that Testimony contradicting scientific evidence under the Physical Facts Rule should be disregarded as determined by rulings in the Sixth and Seventh Circuits was erroneous.

2. Pretrial rulings of the Trial Court unfairly gutted the defendant's constitutional right to present his theory of defense as guaranteed by the Sixth Amendment.

3. Breach of the plea agreement by the government created an "incredible dilemma" for the defendant violating *Santobello v. New York* and *Apprendi v. New Jersey*.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

State of Jurisdiction 1

Constitutional and Statutory Provisions Involved ... 1

Statement of the Case 2

Reasons for Granting the Writ 3

The Tenth Circuit's failure to consider that Testimony contradicting scientific evidence under the Physical Facts Rule should be disregarded as determined by rulings in the Sixth and Seventh Circuits was erroneous 3

Pretrial rulings of the Trial Court unfairly gutted the defendant's constitutional right to present his theory of defense as guaranteed by the Sixth Amendment 6

Breach of the plea agreement by the government created an "incredible dilemma" for the defendant violating *Santobello v. New York* and *Apprendi v. New Jersey* 15

Conclusion 19

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131 (D.C. Cir. 1994) 12

Apprendi v. New Jersey, 120 S.Ct. 2348, 147 L.Ed.2d 435 (June 2000) 15, 17

Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) 16

Bolen v. Rio Rancho Estates, Inc., 466 P.2d 873 (N.M.App.1970) 5

California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) 14

Carnine, Sr. v. United States, 974 F.2d 924 (7th Cir. 1992) 16

Dickerson v. AMAX Inc., 739 F.2d 270 (7th Cir. 1984) 5

Green v. U.S., 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) 17

Harris v. General Motors Corp., 201 F.3d 800 (6th Cir. 2000) 4

Ortega v. Koury, 227 P.2d 941 (N.M. 1951) 5

Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) 15, 16, 18

Satcher v. Honda, 52 F.3d 1311 (5th Cir. 1995) 8

Siruta v. Hesston Corp., 659 P.2d 799, 232 Kan. 654 (1983) 5

State v. Mixon, 27 Kan.App.2d 49, 998 P.2d 519 (2000) 14

United States v. Agyen, 842 F.2d 203 (8th Cir. 1988) 9

TABLE OF AUTHORITIES – Continued

Page

United States v. Ataya, 864 F.2d 1324 (7th Cir. 1988) 16

United States v. Bindley, 157 F.3d 1235 (10th Cir. 1998) 15

United States v. Cross, 928 F.2d 1030 (11th Cir.), cert. denied 502 U.S. 985 (1991) 9

United States v. Hawley, 93 F.3d 682 (10th Cir. 1996) 16

United States v. Lacey, 86 F.3d 956 (10th Cir. 1996) 12

United States v. Lennick, 18 F.3d 814 (9th Cir.) cert. denied 513 U.S. 856 (1994) 10

United States v. Manu, 782 F.2d 1209 (4th Cir. 1986) 9

United States v. Mooney, 654 F.2d 482 (7th Cir. 1981) 16

United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000) 17

United States v. Ortiz, 804 F.2d 1161 (10th Cir. 1986) 14

United States v. Parker, 72 F.3d 1444 (10th Cir. 1995) 14

United States v. Rose, 731 F.2d 1337 (8th Cir.) cert. denied, 469 U.S. 931 (1984) 9

United States v. Saulter, 60 F.3d 270 (7th Cir. 1995) 9

United States v. Shrestha, 86 F.3d 935 (9th Cir. 1996) 17

United States v. Thompson, 730 F.2d 82 (8th Cir.), cert. denied 469 U.S. 1024 (1984) 9

United States v. Valenzuela-Bernal, 458 U.S. 858, 102 S.Ct. 3440 (1982) 14, 15

United States v. Wiman, 77 F.3d 981 (7th Cir. 1996) 14

TABLE OF AUTHORITIES – Continued

Page

United States v. Yemitan, 70 F.3d 746 (2nd Cir. 1995) 16

Zollman v. Symington Wayne Corp., 438 F.2d 28 (7th Cir. 1971) 4

STATUTES

21 U.S.C. § 841(a)(1) 2

21 U.S.C. § 844 12

Fed. R. Ev. 702 .... 6, 7

Fed. R. Ev. 401 11

U.S.S.G. § 5C1.1 15

CONSTITUTION

U.S. Const. Amend. 6 .... 1, 14

OTHER

29A Am. Jur. 2d, Evidence § 1448 4

31A Am. Jur. 2d, Expert and Opinion Evidence §§ 134-135 4

G. Joseph & S. Saltzburg, *Evidence in America*, § 51.3 8

OPINIONS BELOW

U.S. v. Allerheiligen, 1998 WL 386214 (D.Kan. Jun. 08, 1998), *U.S. v. Allerheiligen*, 1998 WL 386210 (D.Kan. Jun. 22, 1998), *U.S. v. Allerheiligen*, 1998 WL 918841 (D.Kan. Nov 19, 1998), *U.S. v. Allerheiligen*, 1999 WL 287711 (D.Kan. Apr 29, 1999), *U.S. v. Allerheiligen*, 49 F.Supp.2d 1273 (D.Kan. May 06, 1999), *U.S. v. Allerheiligen*, 221 F.3d 1353, 2000 CJ C.A.R. 4599 (10th Cir.(Kan.) Aug 01, 2000)

STATEMENT OF JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on August 1, 2000. The Court of Appeals entered an order denying a timely petition for rehearing and petition for rehearing en banc on August 24, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. 6.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and

to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On November 19, 1997, the grand jury returned a one count Indictment in this matter, alleging that on or about September 3, 1997, defendant Mark Henry Allerheiligen possessed with intent to distribute or dispense approximately 1346 marijuana plants regardless of weight, a Schedule I controlled substance, in violation of 21 U.S.C. § 841(a)(1).

On June 1, 1998, Allerheiligen moved to suppress evidence seized as a result of law enforcement's search of his residence, outbuildings and premises on September 3, 1997. The district judge denied Allerheiligen's motion on June 8, 1998.

On November 2, 1998, a pretrial hearing was held, at which the district court considered a variety of motions made by Allerheiligen and the Government. All of Allerheiligen's motions were denied, and all of the Government's motions were either granted, or deferred until trial.

On November 3, 1998, Allerheiligen entered into a conditional plea agreement by which he agreed to plead guilty to the § 841(a)(1) charge, while reserving the right to contest on appeal the district court's adverse rulings on the motions. The plea agreement also reserved the defendant's right at sentencing to have a hearing on the number of marijuana plants that should be considered for the purposes of sentencing.

Pursuant to the Plea Agreement, Allerheiligen entered his plea and was sentenced to 41 months in custody without a hearing on the number of marijuana plants. His timely notice of appeal was filed on May 12, 1999. The Tenth Circuit Court of Appeals affirmed the lower court on August 1, 2000. The Court of Appeals entered an order denying a timely petition for rehearing and petition for rehearing en banc on August 24, 2000.

REASONS FOR GRANTING THE WRIT

1. The Tenth Circuit's failure to consider that Testimony contradicting scientific evidence under the Physical Facts Rule should be disregarded as determined by rulings in the Sixth and Seventh Circuits was erroneous.

This case began when an agent of the government flew an airplane over the defendant's property and spotted what he believed to be marijuana. Defendant argued that the flyover was so low that it violated his fourth amendment rights. The district court determined that the government had not flown too low over the property. App. A. The findings of the district court regarding the altitude of Agent Christy's plane (1,000 feet) were clearly erroneous and mistaken. The Court of Appeals noted that there was contradictory testimony concerning the altitude of the airplane. However, what the defendant argued was that the "uncontradicted scientific evidence" established that the fly over was lower than allowed. App. A. This evidence was based on mathematical calculations of Jerry Cusick, Ph.D., an expert whose testimony was allowed by the district court. Dr. Cusick has a Ph.D. from Purdue

University in technology and education, and gained expertise in using photogrammetry while working with individuals who designed the space shuttle, Challenger. He was on the investigative team following the Challenger space shuttle accident. Using photogrammetry, Dr. Cusick was able to determine that one picture was taken at the altitude of 230 feet. Dr. Cusick further determined that two of the photographs submitted for application of the search warrant were taken at an altitude of 362 feet and 360 feet. The FBI made similar findings. This is contrary to the 1,000 feet testified to by Special Agent Christy. App. A and E. The district court in its decision never even mentions Cusick's testimony or why the district court disregarded the testimony. App. C.

Contradictory testimony is normally an issue for the fact finder to weigh, but under certain circumstances witness testimony that is disputed by the physical facts is not entitled to any probative value and should be disregarded. *Harris v. General Motors Corp.*, 201 F.3d 800 (6th Cir. 2000), *Zollman v. Symington Wayne Corp.*, 438 F.2d 28 (7th Cir. 1971), see also 29A Am. Jur. 2d, Evidence § 1448 and 31A Am. Jur. 2d, Expert and Opinion Evidence §§ 134-135. This concept is known as the "physical facts rule." This rule was most recently considered in the *Harris* case, which stated:

> where the 'palpable untruthfulness of plaintiff's testimony' is evident because the testimony is 'obviously inconsistent with, contradicted by, undisputed physical facts,' summary judgment is warranted notwithstanding testimony offered by the plaintiff.

Harris at 803.

> Physical facts and conditions may point so unerringly to the truth as to leave no room for a contrary conclusion based on reason or common sense, and under such circumstances the physical facts are not affected by sworn testimony which in mere words conflicts with them. When the surrounding facts and circumstances make the story of a witness incredible, or when the testimony is inherently improbable, such evidence is not substantial.

Bolen v. Rio Rancho Estates, Inc., 466 P.2d 873 (N.M.App.1970) quoting *Ortega v. Koury*, 227 P.2d 941 (N.M. 1951). (Both cases involved photographs and measurements)

"[a] jury verdict cannot stand if it is contrary to known scientific principles." *Dickerson v. AMAX Inc.*, 739 F.2d 270, 274 (7th Cir. 1984), *Siruta v. Hesston Corp.*, 659 P.2d 799, 818, 232 Kan. 654, 683 (1983). "A simple example, of course, would be where three bishops, based upon their observation, testified that the world is flat." *Id.* The physical facts disregarded by the trial court clearly established that Agent Christy was flying too low, in violation of the minimum altitude under FAA Regulations and in violation of defendant's airspace. Christy could not even confirm that his altimeter, which measures height, was in service. App. A. Based on this testimony, a mistake was made by the trial court, which should lead this court to disturb the trial court's fact-findings. Findings that the Tenth Circuit was "troubled by." App. A. The altitude formed the key upon which all the other testimony of Agent Christy was based including the issue of the constitutionality of the flyover. If his testimony was contradicted by the physical facts on this issue his testimony

was, arguably, not credible on any other. The failure of the Tenth Circuit to apply the physical facts rule was erroneous and should be overturned.

2. Pretrial rulings of the Trial Court unfairly gutted the defendant's constitutional right to present his theory of defense as guaranteed by the Sixth Amendment.

The wholesale refusal of the trial court to allow expert witness testimony and certain other evidence thwarted the defendant from presenting his theory of defense.

The defendant sought to introduce testimony from five expert witnesses, Ed Rosenthal, Walt Carroll, William Logan, Dr. Stuart Twemlow and Dr. Matthew Schlotterback.

Defendant's theory of defense throughout the case was that he was cultivating certain marijuana plants for his own personal use, but that other marijuana, in significant numbers, grew wild. There is no dispute that marijuana did, in fact, grow wild throughout the area. The government, however, contended that defendant had "adopted" or otherwise cared for the marijuana which the government referred to as cultivated. App. A.

Three of the expert witnesses had specialized knowledge, which included the issues of marijuana growth, cultivation practices, processing, use and yield. Expert opinions are admissible, where the expert has "scientific, technical, or other specialized knowledge" which would "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Ev. 702. The defense

established that Mr. Rosenthal had "scientific, technical, or other specialized knowledge" which would qualify him as an expert. See Fed. R. Ev. 702. Defense counsel proffered Rosenthal's qualifications to the trial court. App. B. Defendant provided a current resume from Rosenthal, an affidavit of Rosenthal, and copies of his publications all in support of the argument that Rosenthal was qualified to offer an opinion based upon his personal knowledge and experience with marijuana. App. B. Despite this proffered foundation, however, the district judge ruled that Rosenthal lacked the requisite qualifications to testify as an expert. App. A and B. Walt Carroll was not allowed to testify *at all*. App. A and B.

Like Government witnesses Special Agent Christy, Special Agent Sabel, and Marshall County Sheriff Coggins, Rosenthal's expertise, as well as Logan's and Carroll's, was based primarily upon their experience. The government's witnesses, like the defense experts, had no college degrees or formal education in chemistry, botany, biology or any other field related to the cultivation of marijuana, yet the district judge only found it significant that Rosenthal lacked this background. App. B and C. Allerheiligen established that Mr. Rosenthal had "scientific, technical, or other specialized knowledge" which would "assist the trier of fact to understand the evidence or to determine a fact in issue." See Fed. R. Ev. 702. Rosenthal has 28 years of experience observing, researching, and assisting in the growing of marijuana. Rule 702 allows a witness to be qualified as an expert by "knowledge, skill, experience, training, or education." Rosenthal's lack of formal education should be irrelevant, as his knowledge and experience is tremendous. Specialized

knowledge can be derived from formal experience as well as from education or training. For example, the Fifth Circuit held it was proper to permit a former police chief to testify that motorcycle crash guards are effective in reducing injuries, even though the witness had no scientific or engineering expertise in motorcycle design. *Satcher v. Honda*, 52 F.3d 1311 (5th Cir. 1995) The witness had investigated hundreds of motorcycle accidents and was subject to extensive cross-examination regarding his lack of formal scientific and engineering training, and any weakness in his qualifications would go to the weight, not the admissibility of the evidence. See also G. Joseph & S. Saltzburg, *Evidence in America*, § 51.3 (Courts have made it clear that "trial judges are not to demand that the proffered expert possess the highest possible credentials or skills, or be the most qualified of all conceivable experts).

Expert witness, Walt Carroll, a law enforcement officer for the State of Nebraska for 25 years, had been a training instructor in the area of drug detection, interdiction and prosecution of drug cases and had inspected the defendant's property approximately two weeks after the government search. He was prepared to testify that he found no evidence of cultivation which was key to the defendant's theory of defense. App. A and B. He was not permitted to testify at all, whether as an expert or as a lay person fact witness. Contrast the trial court's refusal to permit the Nebraska officer who instructed and trained others regarding drugs with the allowance of the testimony, including expert type opinions on drug matters, of Special Agent Christy. Courts have consistently relied upon a witnesses' experience and training as the basis for

qualification as an expert. Law enforcement agents have been permitted to testify about the process of manufacturing crack. See *United States v. Saulter*, 60 F.3d 270 (7th Cir. 1995) ([his subject was "likely beyond the ken of the average juror.") A DEA agent was allowed to testify as to the street value of pure heroin contained in a mixture, even though the agent had never analyzed the value of heroin before. *United States v. Agyen*, 842 F.2d 203 (8th Cir. 1988). Investigative agents were allowed to testify as to the purity of heroin generally distributed and the identification of a scale as a tool of heroin trade because the agents had many years of experience investigating heroin distribution in *United States v. Manu*, 782 F.2d 1209 (4th Cir. 1986). Testimony about the results of a shoe-print comparison was allowed, where officer's only expertise with shoe-prints came from on-the-job training over a six-year period, in *United States v. Rose*, 731 F.2d 1337 (8th Cir.) cert. denied, 469 U.S. 931 (1984) (Holding that "an expert witness need not be an outstanding practitioner in the field nor have certificates of training in the particular subject".) The Secret Service has been allowed to testify that bills were counterfeit in *United States v. Thompson*, 730 F.2d 82 (8th Cir.), cert. denied 469 U.S. 1024 (1984). An FBI agent was allowed to testify that certain pictures would be of sexual interest to pedophiles and to offer his expert opinion that the pictures were obscene in *United States v. Cross*, 928 F.2d 1030 (11th Cir.), cert. denied 502 U.S. 985 (1991). In the cited cases, the witnesses' expertise came from experience and knowledge, not from any particular educational curriculum.

Experience is often relied upon for expert qualification in testimony regarding marijuana cultivation. In

United States v. Lennick, 18 F.3d 814 (9th Cir.) cert. denied 513 U.S. 856 (1994), an officer was permitted to testify about the length of time it takes to grow a marijuana plant, the amount of marijuana it takes to make a cigarette, and the amount of marijuana one could obtain from a single plant. The officer's qualifications were based on his knowledge, police training and participation in six previous drug investigations. On cross-examination, he admitted to personally growing marijuana, but could not answer certain questions about marijuana horticulture. Yet his testimony was deemed relevant and admissible, since such matters may be outside the common knowledge of a jury which was determining whether the defendant was growing more marijuana than he could consume.

Mr. Rosenthal, like the witnesses described above and like the law enforcement officers the Government relied upon in this case, gained his knowledge and expertise through on-the-job training as an author and researcher. Regarding marijuana use and growth, he certainly is more qualified than the officer in *Lennick*. Rosenthal spent 28 years studying marijuana, its growth, and consulting with other experts in those areas. His specialized knowledge would certainly have helped a jury better understand the facts at issue. Rosenthal's testimony was directly relevant on the question of whether the marijuana plants the Government attributed to Allerheiligen were cultivated or wild, and whether the quantity of cultivated plants was consistent with a personal use defense, which would have supported the lesser-included offense of simple possession.

Instructor Carroll gained his experience as a law enforcement officer and instructor. And Instructor Carroll personally inspected the property after the search. His testimony would have certainly aided the jury in better understanding the facts at issue. With his experience as a law enforcement officer, expert witness and instructor, it cannot be seriously disputed that he is not qualified to testify, *at least*, as a lay witness.

Defendant also sought to introduce the testimony of two doctors who would have testified regarding issues centered around defendant's chronic personal use of marijuana. Dr. Twemlow would testify that defendant imbedded in marijuana to deal with hyperactivity and depression which has created a chronic habit of personal marijuana use over the years. App. A.

The defendant has always asserted that he was growing marijuana for his own personal use and that all other marijuana seized was wild marijuana. The proffered evidence of Twemlow related to whether the marijuana plants on the premises were for Allerheiligen's personal use or were cultivated for sale. App. A. Evidence of regular use of marijuana would have bolstered a personal use defense. Dr. Twemlow could have testified as to the appellant's veracity, and to Allerheiligen's habit of using marijuana in order to medicate himself for his personality disorder. It would have helped the jury understand that the larger quantities of plants which the Government claimed were cultivated for sale were, in fact, wild. See Fed. R. Ev. 401.

The district court ruled that Twemlow's testimony would be excluded, because Allerheiligen was charged

with possession with intent to distribute marijuana therefore medical use of marijuana was irrelevant. The district judge relied on the prohibition of such use in Schedule I, citing *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131, 1134 (D.C. Cir. 1994). App. B. However, contrary to the district judge's ruling, this evidence was probative to Allerheiligen's argument that if he was guilty at all, it was of the lesser included offense of simple possession. See 21 U.S.C. § 844; *United States v. Lacey*, 86 F.3d 956, 970 (10th Cir. 1996) .

The district judge made a similar ruling with respect to the proffered testimony of Dr. Schlotterback, who would have testified to "his knowledge of defendant's medical history." Dr. Schlotterback would have testified that defendant's long term "chronic pain" caused Allerheiligen to use marijuana. App. A and B.

As was the case with Dr. Twemlow's testimony, the district judge ruled that Dr. Schlotterback's testimony was irrelevant. According to the district judge, the same reasons explained regarding Dr. Twemlow supported the ruling excluding Dr. Schlotterback.

Finally, the Court of Appeals and the District Court misconstrued the relevancy of the 1998 videotape. The district court excluded a 1998 video of defendant's property from consideration at trial on the basis that it was not relevant. The videotape was relevant not for purposes of proving wild marijuana grew in the area, but to establish that plants in 1997 Kansas Bureau of Investigation video looked the same in 1998 even though there is no dispute that the 1998 plants were never cultivated. Nor was the defendant charged with growing marijuana in

1998. App. A. If the plants in 1998 looked the same as those in 1997 it would be difficult to argue that the 1997 plants were adopted or cared for. The government had argued that the wild plants were adopted. The 1998 video would show that adoption can not take place if the plants were not cultivated or provided with care. The defendant did not take issue with the use of a 1997 video taken at the time of seizure. In fact, it was necessary to view both videos one after the other to understand the defense that is being raised. The videotape presented the key piece of evidence defendant intended to introduce to refute the adoption theory of the government.

To summarize the trial court's rulings on defense witnesses and exhibits:

Defense Witness/ Exhibit	Type of Witness/ Evidence	Ruling
Walt Carroll	Expert	Not allowed to testify
Ed Rosenthal	Expert	Not allowed to testify
William Logan	Expert	Not allowed to testify
Dr. Twemlow	Expert	Not allowed to testify
Dr. Schlotterback	Expert	Not allowed to testify
Wild marijuana tapes	Video of Scene	Disallowed

The trial court's ruling eviscerated the case for the defense. Complete disallowance of the proffered witnesses, testimony and exhibits by the trial court simply, but totally, gutted the defense theory, a theory with substance and credibility. On top of all that, defendant was prevented from contesting the number of plants of marijuana at sentencing, under threat of his loss of safety valve provisions, despite his plea agreement to the contrary. This court needs to look at this extraordinary exclusion of defense evidence *collectively* to appreciate the overall effect on the ultimate outcome.

A defendant should be entitled to present the theory of his defense. *United States v. Ortiz*, 804 F.2d 1161 (10th Cir. 1986), *United States v. Wiman*, 77 F.3d 981 (7th Cir. 1996), *State v. Mixon*, 27 Kan.App.2d 49, 998 P.2d 519 (2000). A defendant's fundamental right to a fair trial is violated if relevant, admissible and noncumulative evidence which is an integral part of the theory of his defense is excluded. *United States v. Ortiz*, supra. Due process requires a fair opportunity to present a defense in a criminal prosecution. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984). Where a defendant has been denied the right to present material, exculpatory evidence that would have supported his defense, his due process and Sixth Amendment rights are violated. See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 868, 102 S.Ct. 3440, 3446-47 (1982); *United States v. Parker*, 72 F.3d 1444, 1451 (10th Cir. 1995).

Clearly, evidence tending to show that wild marijuana grew freely in the area; that it was possible to discern the difference between wild marijuana and cultivated marijuana; that the wild marijuana did not show

signs of cultivation; that cultivated plants were substantially less in number than alleged by the government; that cultivation was for personal use; that defendant used marijuana to relieve hyperactivity and depression was all material and relevant. The test as to whether the evidence is material or not is whether it could have affected the trial's outcome. *United States v. Valenzuela-Bernal*, supra at 868, 102 S.Ct. at 3446-47 (1982). The jury would have been entitled to be instructed on such a defense. See *United States v. Bindley*, 157 F.3d 1235, 1241 (10th Cir. 1998) for the proposition that a criminal defendant is entitled to a theory of defense instruction that is legally justified and supported by sufficient evidence for a jury to find in defendant's favor. The cumulative effect of the trial court's pretrial rulings violated the defendant's constitutional right to present a defense.

3. Breach of the plea agreement by the government created an "incredible dilemma" for the defendant violating *Santobello v. New York* and *Apprendi v. New Jersey*.

The plea agreement reserved the right to a contested sentencing with regard to the number of marijuana plants attributed to defendant for purposes of calculating his offense level. App. E. Further, the government agreed not to oppose application of the safety valve provisions in the plea agreement. App. E. The safety valve is found at U.S.S.G. § 5C1.1.

The government violated the plea agreement, taking the position that the safety valve would not be given to the

defendant if evidence was offered by the defense regarding the number of marijuana plants used in calculating the base offense level. This exchange took place in chambers prior to sentencing. The Court, likewise, told counsel that the defendant would not be eligible for the safety valve provision if defendant continued to argue his objections to the number of marijuana plants. App. D and E.

Clearly, any government breach of a plea agreement is to be reviewed de novo as a question of law. *United States v. Hawley*, 93 F.3d 682, 690 (10th Cir. 1996).

Plea agreements are contracts conferring all of the attendant rights and obligations governed by ordinary principles of contract law. *Carnine, Sr. v. United States*, 974 F.2d 924 (7th Cir. 1992). Plea agreements, though, are unique contracts "in which special due process concerns for fairness and adequacy of procedural safeguards obtain." *United States v. Ataya*, 864 F.2d 1324 (7th Cir. 1988). The essence of the particular agreement and the Government's conduct relating to its obligations in the case are determinative. *United States v. Mooney*, 654 F.2d 482, 486 (7th Cir. 1981). Plea agreements are subject to public policy constraints that bear upon enforcement of other contracts. *United States v. Yemitan*, 70 F.3d 746 (2nd Cir. 1995). Plea bargains must be enforced to secure benefits conferred on defendant, prosecution, and public. *Blackledge v. Allison*, 431 U.S. 63, 71, 97 S.Ct. 1621, 1627-28, 52 L.Ed.2d 136 (1977). A bargained-for promise by the prosecutor must be fulfilled. *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 498-99, 30 L.Ed.2d 427 (1971).

It is critical to note that defendant was placed in the untenable position of being between a rock and a hard

place. If the defendant argues against the number of marijuana plants attributed to him then according to the government, he'll lose his safety valve. (Which amounts to 80 months added to his sentence.) If the defendant doesn't argue the number of plants, he gets the safety valve, which results in a 41-month prison sentence, far greater than would be imposed for the limited number of plants he actually cultivated. This placed the defendant in an "incredible dilemma" in which his bargained for right to a hearing on the number of plants was set against his bargained for right to obtain the safety valve. *Green v. U.S.*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). At worst the prosecutor purposefully induced the defendant to enter into a plea agreement which contained promises that the prosecutor would later argue to be mutually exclusive. At best the prosecutor erroneously believed that the safety valve did not apply if the number of plants were contested contrary to the reasoning in *United States v. Shrestha*, 86 F.3d 935 (9th Cir. 1996) (affirming safety valve credit even though defendant denied guilty knowledge at trial and at sentencing). This dilemma in question was precipitated by the government's conduct. The defendant should have been free to argue the number of plants without threat of the loss of the safety valve, in accord with the plea agreement. This is particularly important in light of this court's recent decision in *Apprendi v. New Jersey*, 120 S.Ct. 2348, 147 L.Ed.2d 435 (June 2000) which was extended to the issue of the number of marijuana plants in *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000). Under these cases, the defendant

had a right to a finding concerning the number of marijuana plants based upon a beyond a reasonable doubt standard. Such a finding did not occur in the case at bar.

The Tenth Circuit's denial of relief because of a lack of a record of the chambers meeting ignores the practicalities and realities of practice before the federal bench. For defense counsel to have requested a record under these circumstances with the trial court and government counsel prepared to pull the safety valve provisions upon any further objections to the number of marijuana plants would be legal "suicide." Imagine defense counsel trying to explain to the client that to make his objections "of record" got the client 80 months added on to his sentence. Defense counsel thereupon took the prudent step of attempting to preserve the record by filing his Motion to Reconsider Rulings Made in Chambers. For the Tenth Circuit to assert the lack of a sufficient record ignores the argument. Defendant has been placed in an incredible dilemma whereby he has had no forum to argue the bargained-for proviso from the plea agreement that concerns the number of marijuana plants involved without being subjected to loss of his safety valve. Even the Trial Court's Memorandum and Order on the defendant's Motion to Reconsider Rulings Made in Chambers (App. D) confirms that the trial court believed that the defendant would not be eligible for safety valve provision if the defendant continued to argue his objections and further confirms that the discussion took place in chambers.

As asserted in defendant's brief, if a breach of a plea agreement occurs, the defendant is entitled to a remedy. *Santebello v. New York*, supra. Here, the plea agreement was clearly breached and defendant was denied his

opportunity to contest the number of marijuana plants. It cost him a bargained-for chance to reduce his bare offense level and demand a beyond a reasonable doubt review of the evidence. This violates the plea agreement, his own "unique contract," and defies basic fairness and public policy.

The appropriate remedy would be to permit a new sentencing hearing with a different judge and without the threat of losing the safety valve as long as defendant does not contradict any prior statements he has made.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

ROBERT L. POTTROFF #10220
MYERS, POTTROFF & BALL
320 Sunset Avenue
Manhattan, Kansas 66502
Telephone: (785) 539-4656
Attorney for Petitioner

APPENDIX A

NOTICE: THIS IS AN UNPUBLISHED OPINION.

United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Mark Henry ALLERHEILIGEN, Defendant-Appellant.
Nos. 99-3144, 99-3154.

Aug. 1, 2000.

Before BALDOCK, HENRY, and LUCERO, Circuit Judges.

ORDER AND JUDGMENT*

HENRY

The appellant, Mark Henry Allerheiligen, entered a conditional plea of no contest to possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1). The district court gave Mr. Allerheiligen safety valve credit and sentenced him to a term of imprisonment of 41 months.

Mr. Allerheiligen appeals, asserting error in the following: (1) denial of his motion to suppress; (2) exclusion of videotape evidence that would allegedly depict wild marijuana growing in the same area from which the government seized cultivated marijuana plants over a year

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.

after the seizure; (3) exclusion of testimony from three proffered expert witnesses on the differences between marijuana grown for personal use versus distribution; (4) exclusion of expert testimony regarding Mr. Allerheiligen's psychological and/or psychiatric condition; (5) denial of his motion to exclude testimony regarding evidence the government had seized but not preserved; and (6) breach of the plea agreement. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and, for reasons discussed below, affirm Mr. Allerheiligen's conviction and sentence.

I. BACKGROUND

On the morning of August 27, 1997, at the request of Marshall County Sheriff Kenneth Coggins, Special Agent David Christy of the Kansas Bureau of Investigation (KBI) flew over Mr. Allerheiligen's farm property in a fixed-wing aircraft. Special Agent Larry Dixon and Sheriff Coggins were also present in the aircraft at that time.

Mr. Allerheiligen's property is located in a rural area in Marshall County, Kansas. During the fly-over, Agent Christy caught sight of what he believed to be several hundred cultivated marijuana plants in a clearing in the trees behind a residence. Agent Christy also observed a two-story white house and five out buildings.

From the aircraft, and using a Cannon T-50 camera with a 35 to 85mm lens, Agent Christy photographed the clearing containing what he believed to be marijuana plants and a pathway leading from the plants to a fence which contained a gate at the back of a barn. He also photographed the residence and out buildings.

Two days later, using the open field doctrine, Agents Dixon and Sabel and Sheriff Coggins walked into the marijuana field and made the following observations: numerous marijuana plants had been broken off 10-12 inches above the ground; one plant had been pulled and had a grow cup (pot cup) still attached to the root system; a fairly new candy wrapper was found in the marijuana patch; there was a foot trail leading from the marijuana patch to a gate; and the marijuana patch was within a fenced-off area with barbed wire and other fence encasing it.

On September 2, 1997, Agent Christy submitted an affidavit to the magistrate judge containing all of the aforementioned facts in support of an application for a warrant to search the property, including Mr. Allerheiligen's residence, all out buildings, and any other structures with foot trails leading to or from the marijuana field. Based on the information Agent Christy submitted, the magistrate judge issued the warrant.

The warrant was executed the following day. Agents discovered marijuana in four different areas – three separate outdoor patches and an indoor marijuana grow room. The agents seized 782 marijuana plants from the patch north of Mr. Allerheiligen's barn, 232 plants from the patch near a corn crib, 143 plants from the patch south of a marijuana grow shed, and 19 plants from the indoor grow room.

The agents additionally seized 179 dead plants from one of the outdoor patches as evidence that Mr. Allerheiligen had "sexed" the plants by removing only the male plants and leaving the females. The officers testified

that the majority of plants seized contained peat pot matter within the root system, which is indicative of cultivated marijuana that is started in a peat pot and later transplanted to the ground.

In the indoor marijuana grow room, agents located "bags of miracle grow, potting soil, 57 pots to transplant plants, 23 plant trays and approximately 10 pots that had previously been used." App. vol. VIII, at 9 (Presentence Report). In the grow room, lights, an air conditioner, and a fan were being regulated on a timer. Other items seized during the search of Mr. Allerheiligen's property included a book on marijuana botany, a marijuana grower's guide, balance scales, marijuana seeds, a suitcase containing marijuana residue, and numerous weapons.

Mr. Allerheiligen filed a motion to suppress, raising various challenges to the constitutionality of the search of his property. On June 1, 1998, the district court held an evidentiary hearing, following which the court denied the motion.

Both the government and Mr. Allerheiligen filed pretrial motions seeking to exclude evidence. The court conducted an evidentiary hearing on these motions. In a subsequent written order, the court granted the government's motion in limine, thereby excluding expert testimony on Mr. Allerheiligen's psychological and/or psychiatric condition and testimony regarding the videotapes allegedly depicting wild marijuana on his property over a year after the seizure. The court also excluded the proffered expert testimony of Ed Rosenthal, William Logan, and Walt Carroll regarding the differences

between wild and cultivated marijuana and the condition of his property after the seizure. The court denied Mr. Allerheiligen's motion to exclude testimony regarding marijuana plants and peat pots the government had not preserved.

On November 3, 1998, prior to trial, Mr. Allerheiligen entered into a plea agreement with the government. Pursuant to this agreement, Mr. Allerheiligen pleaded guilty to the § 841(a)(1) charge but reserved the right to appeal most of the pretrial rulings. The government, in turn, agreed to a contested sentencing hearing on the number of marijuana plants attributable to Mr. Allerheiligen. The government further agreed not to oppose application of the safety valve, pursuant to 18 U.S.C. § 3553(f) and USSG § 5C1.2, if the probation officer who prepared the presentence report determined it to be appropriate.

The presentence report attributed 1,346 marijuana plants to Mr. Allerheiligen. The probation officer who authored the report approved application of the safety valve. However, in a chambers conference prior to sentencing, the court advised both parties' counsel that it would not be inclined to award safety valve credit if Mr. Allerheiligen contested the number of plants which had been attributed to him in the presentence report.

Consequently, Mr. Allerheiligen withdrew his objections to the number of plants attributed to him in the presentence report and received safety valve credit. The court sentenced him to 41 months' imprisonment.

II. DISCUSSION

A. Motion to Suppress

When reviewing a district court's denial of a motion to suppress, we consider the totality of the circumstances and view the evidence in the light most favorable to the government, accepting the district court's factual findings unless they are clearly erroneous. *See United States v. Long*, 176 F.3d 1304, 1307 (10th Cir.1999). "The credibility of witnesses, the weight to be given evidence, and the reasonable inferences drawn from the evidence fall within the province of the district court." *Id.* "[T]he ultimate determination of reasonableness under the Fourth Amendment[, however,] is a question of law" we review de novo. *Id.*

1. Material Falsehoods or Omissions in the Affidavit

Mr. Allerheiligen contends Agent Christy provided false and misleading information to the magistrate in his affidavit underlying the search warrant. A search warrant must be voided and the fruits of the search excluded where a defendant establishes by a preponderance of the evidence that the affiant knowingly or recklessly submitted false statements or omitted information material to the magistrate's finding of probable cause. *See United States v. Kennedy*, 131 F.3d 1371, 1376 (10th Cir.1997) (citing *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) and *Stewart v. Donges*, 915 F.2d 572, 581-82 (10th Cir.1990)). The burden, therefore, falls upon the defendant to establish "the affiant in fact entertained serious doubts as to the truth of his allegations." *Bruning*

v. Pixler, 949 F.2d 352, 357 (10th Cir.1991) (internal quotations omitted).

Recklessness may be inferred where the omitted information was "clearly critical" to the probable cause determination. *DeLoach v. Bevers*, 922 F.2d 618, 622 (10th Cir.1990) (internal quotations omitted). Mere negligence or innocent mistake is insufficient to void a warrant. *See Franks*, 438 U.S. at 171; *see*, e.g., *United States v. Clapp*, 46 F.3d 795, 800-801 (8th Cir.1995).

"Whether false statements or omissions are intentional or reckless is a factual finding reviewed under the clearly erroneous standard. Whether misstatements and omissions are material to a finding of probable cause is subject to de novo review." *United States v. Dozier*, 844 F.2d 701, 705 (9th Cir.1988) (citations omitted).

a. The Altitude of the Fly-over

Mr. Allerheiligen contends Agent Christy falsely stated in his affidavit that he flew over Mr. Allerheiligen's property at an altitude of approximately 1,000 feet. He asserts the "uncontradicted scientific evidence shows" Agent Christy was flying at approximately 300 feet. Aplt's Br. at 11-12. Mr. Allerheiligen further argues that a fly-over conducted at an altitude of 300 feet violated his Fourth Amendment rights.

Contrary to Mr. Allerheiligen's assertion, the evidence of Agent Christy's actual altitude during the fly-over presented at the suppression hearing was contradictory. Jerry G. Cusick testified as an expert for the defense

that one of Agent Christy's photographs of Mr. Allerheiligen's property had been taken at an altitude of 231 feet, and that two others had been taken from approximately 360 feet. Agent Christy, however, testified that he was flying at an altitude of 1,000 feet. He explained that his assessment of the altitude during the fly-over was based on his altimeter. On cross-examination Agent Christy admitted that his altimeter "could have been out of certification" because there is no certification requirement for altimeters on the type of aircraft he was flying. App. vol. IV, at 29. However, he also testified that he had no reason to believe that his altimeter was not working properly.

After considering both witnesses' testimony, the district court nevertheless found that the fly-over occurred at an altitude of approximately 1,000 to 2,000 feet, and therefore, under *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986), Mr. Allerheiligen's Fourth Amendment rights had not been violated. Although we are troubled by the great disparity in testimony regarding the altitude at which Agent Christy conducted the fly-over, we must "not disturb a sentencing court's factual findings unless they are without factual support in the record, or if after reviewing all the evidence we are left with the definite and firm conviction that a mistake has been made." *United States v. Moore*, 130 F.3d 1414, 1416 (10th Cir.1997) (internal quotations omitted).

Here, the court's finding that the fly-over occurred at approximately 1,000 feet is supported in the record by Agent Christy's testimony. We must give substantial deference to the district court's decision to judge Agent

Christy's testimony as more credible than that of the defendant's expert, Mr. Cusick.

Further, we note, as did the district court, that the Supreme Court has approved of aerial surveillance at an altitude as low as 400 feet. *See Florida v. Riley*, 488 U.S. 445, 451-52, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989). Moreover, we agree with the district court that the photographs Agent Christy took of Mr. Allerheiligen's property during the fly-over " 'are not so revealing of intimate details as to raise constitutional concerns.' " App. vol. I, at 214 (quoting *Dow Chem. Co. v. United States*, 476 U.S. 227, 238, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986)).

Thus, our review of the record does not leave us "with the definite and firm conviction that a mistake has been made." *United States v. Bautista*, 145 F.3d 1140, 1146 (10th Cir.1998). Accordingly, we conclude the court's finding was not clearly erroneous.[1]

---

[1] Because we defer to the court's factual finding that the fly-over was conducted at approximately 1,000 feet, we do not address Mr. Allerheiligen's argument that a fly-over at approximately 300 feet is a Fourth Amendment violation of his private airspace. However, we do note our court has held that a helicopter search of marijuana gardens at "an altitude substantially less than five hundred feet" does not violate the Fourth Amendment where the marijuana gardens are located in open fields and thus not part of the curtilage of the defendant's home. *United States v. Swepston*, 987 F.2d 1510, 1512, 1515-16 (10th Cir.1993). Here, Mr. Allerheiligen does not challenge the court's finding that the marijuana was located in an open field not within the curtilage of his home.

b. Other Alleged Falsehoods and Omissions in the Affidavit

Mr. Allerheiligen alleges Agent Christy submitted other materially false or misleading statements in the affidavit. In support of these allegations, Mr. Allerheiligen directs us to Agent Christy's testimony at the suppression hearing, as well as that of other witnesses, arguing they contradict Agent Christy's assertions in his affidavit and therefore prove such assertions are false or misleading. However, this evidence is unconvincing and fails not only to prove the statements were false or misleading, but it fails to establish that the statements were material to the determination of probable cause. *See Kennedy,* 131 F.3d at 1375.

First, Mr. Allerheiligen alleges Agent Christy lied about not observing any wild marijuana on his property during the fly-over. His only evidence in support of the falsity of this statement is testimony from various witnesses that wild marijuana is prevalent in the area generally, especially along the creek bed that runs south of Mr. Allerheiligen's property. The testimony from these witnesses does not establish Agent Christy's statement was knowingly false or misleading. *See Kennedy,* 131 F.3d at 1376. Agent Christy did not deny the existence of wild marijuana in the area, rather, he only submitted that he did not observe any on Mr. Allerheiligen's property during the fly-over. *See,* e.g., *United States v. Searcy,* 181 F.3d 975, 980 (8th Cir.1999) ("Minor errors in the warrant which do not reflect deliberate falsehoods are insufficient to mandate suppression. . . . ").

Second, Mr. Allerheiligen takes issue with Agent Christy's statement in the affidavit that "[t]he plants and paraphernalia are located in an area which were not visible from the county roadway and had a distance that would make normal gardening very laborious." App. vol. I, at 44 (Aff. of Agent Christy). Specifically, he argues use of the word "paraphernalia" was misleading. In support of this argument he points to Agent Christy's testimony that "paraphernalia" referred only to a garden hose he observed next to the barn during the fly-over and a peat pot the agents observed when they walked through the marijuana patch. Although use of the word "paraphernalia" may have been somewhat of an overstatement, Mr. Allerheiligen points to nothing in the record to suggest Agent Christy chose that word with the intention of misleading the magistrate. Moreover, there is no evidence that use of the word "paraphernalia" was material to the magistrate's finding of probable cause.

Finally, Mr. Allerheiligen contends Agent Christy's ability to discern between wild and cultivated marijuana required viewing the tops of the plants, and, therefore, his failure to include this fact in his affidavit underlying the search warrant was a material omission. In support of this contention, he relies on Agent Christy's testimony at the suppression hearing that "the plants that [he] saw were not consistent with plants that grow naturally on this continent. The plants [he] observed had round tops, rather than pointed." App. vol. IV, at 11. He further argues the photographs, as well as Agent Christy's own testimony, illustrate that he could not have made such an identification at an altitude of 1,000 feet.

Again, this argument is without merit. The district court found Agent Christy had observed both wild and cultivated marijuana on over 300 separate occasions and had fourteen years of experience in aerial identification of marijuana. Nothing in Agent Christy's testimony during the suppression hearing suggested that viewing the tops of the plants is the only means by which to distinguish cultivated from wild marijuana. In fact, in the affidavit Agent Christy stated he believed the plants he observed were cultivated, as opposed to wild, based partly on the fact that "[t]he height, the shape and dissimilar shade of green . . . [was] consistent with [his] previous observations of growing cultivated marijuana." App. vol. I, at 123 (Aff. of Agent Christy). Agent Christy's testimony does not conflict with his statements in the affidavit. Thus, there is no support for the contention that Agent Christy omitted any material information.

Further, Mr. Allerheiligen has presented no evidence that Agent Christy could not distinguish between rounded and pointed tops from 1000 feet. Contrary to Mr. Allerheiligen's position, during his testimony at the suppression hearing, Agent Christy did not retreat from his statement in the affidavit that he could identify cultivated marijuana plants through aerial surveillance. Rather, he only conceded that his identification from the air could never be certain. Accordingly, the district court did not err in rejecting Mr. Allerheiligen's contentions of material falsehoods and omissions in the affidavit. *See United States v. Haimowitz*, 706 F.2d 1549, 1556 (11th Cir.1983).

2. There was probable cause to search the residence.

Mr. Allerheiligen asserts there was insufficient evidence of probable cause to search his residence.[2] He contends "none of the information in [Agent] Christy's affidavit that was gathered from his fly-over or from the Kansas officers' invasion of [his] property during the walk-in can properly be relied upon in testing the sufficiency of the warrant." Aplt's Br. at 15.

It is true that, in order to determine whether the search warrant was valid and issued upon probable cause, the supporting affidavit must be analyzed without facts that are tainted by prior illegality. *See United States v. Anderson*, 981 F.2d 1560, 1568 (10th Cir.1992). However, we have already concluded the aerial search over Mr. Allerheiligen's property did not violate his constitutional rights. We have further concluded there is no evidence to support Mr. Allerheiligen's assertion that Agent Christy

---

[2] Within his probable cause challenge, Mr. Allerheiligen makes additional allegations that Agent Christy submitted false or misleading statements in the affidavit underlying the search warrant. For instance, he asserts the "foot path" the agents allegedly observed during the walk-in was really a cattle path. Moreover, he asserts the statement in the affidavit that the marijuana patch was in a fenced-off area was misleading because the fencing was around the entire pasture, not just the marijuana patch. However, we conclude that, "[d]isregarding the[se] allegedly false [or misleading] statements in [the] affidavit, the other evidence presented by the government amply supported a finding of probable cause." *United States v. Salameh*, 152 F.3d 88, 114 (2d Cir.1998); *see United States v. Myers*, 106 F.3d 936, 940 (10th Cir.1997).

intentionally misled the magistrate in his affidavit underlying the search warrant. Therefore, we may consider Agent Christy's observations during the fly-over in testing the sufficiency of the warrant.

Moreover, the district court found the walk-in on Mr. Allerheiligen's property was constitutional. The court reasoned the marijuana field was an "open field" not within the curtilage of Mr. Allerheiligen's home and, therefore, was not entitled to Fourth Amendment protection. Mr. Allerheiligen does not challenge this finding on appeal. Thus, we may consider the agents' observations during the walk-in in testing the sufficiency of the warrant.

Probable cause means that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). We give great deference to the magistrate's determination of probable cause and will uphold that conclusion if the "totality of the information contained in the affidavit provided a substantial basis for finding there was a fair probability that evidence of criminal activity would be found." *United States v. Janus Industr.*, 48 F.3d 1548, 1553 (10th Cir.1995) (internal quotations omitted).

In the affidavit, Agent Christy submitted that during aerial surveillance he observed what he believed to be several hundred cultivated marijuana plants in a clearing behind Mr. Allerheiligen's residence. He furthered [sic] stated that he observed a pathway leading from the plants to a fence which contained a gate at the back of a barn. Agent Christy's affidavit also relayed the following

observations by the agents who performed the walk-in: there were numerous marijuana plants broken off ten to twelve inches above the ground, one plant that had been pulled had a peat pot still attached to the root, and there was a fairly new candy wrapper in the marijuana patch.

The agents' observations during the walk-in, coupled with those made by Agent Christy during the fly-over, clearly support the magistrate's finding of probable cause to search Mr. Allerheiligen's residence. *See*, e.g., *United States v. Emmons*, 24 F.3d 1210, 1215 (10th Cir.1994) (affirming probable cause determination in part because "the judge who issued the warrant was certainly entitled to consider the large quantity of marijuana discovered during the two expeditions onto [the defendant's] property, an amount totally at odds with purely personal consumption" and rejecting the defendant's "argu[ment] that even if the marijuana could give rise to an inference of distribution, it could not fairly be inferred that evidence would be found in his home."); *United States v. Morehead*, 959 F.2d 1489, 1499 (10th Cir.1992) (holding that "officers' observations of marijuana plants in the trailer and shop building adjacent to the [defendant's] residence" provided a substantial basis for the conclusion that there was a fair probability that evidence of a crime would be found on the property); *United States v. Wilson*, No. 97-5201, 1998 WL 482786, at ___ 3 (10th Cir. Aug.12, 1998) ("The affiant's statement that during an aerial fly-over he viewed marijuana plants on land where Defendant resided and the other statements in the affidavit that Defendant exhibited behavior consistent with those involved in the production of marijuana established a fair

probability that a crime was being committed and support a finding of probable cause"); *United States v. Malin*, 908 F.2d 163, 166 (7th Cir.1990) (upholding magistrate's probable cause finding where the affidavit underlying the warrant to search the defendant's house did not directly link the marijuana observed by officers to the house or cite any evidence of cultivation), abrogation on other grounds recognized in *United States v. Monroe*, 73 F.3d 129 (7th Cir.1995); *United States v. Fuesting*, 845 F.2d 664, 671 (7th Cir.1988) (stating "probable cause existed for the search given the observations of the officers in the helicopter"). Accordingly, we conclude that the district court did not err in denying the motion to suppress.

B. Exclusion of videotape evidence allegedly depicting the condition of Mr. Allerheiligen's property a year after the seizure

The crux of Mr. Allerheiligen's defense was that he cultivated only a few marijuana plants for personal use and that the rest of the marijuana seized by the government was wild. Prior to trial, Mr. Allerheiligen disclosed to the prosecution a list of witnesses, some of whom would testify regarding two videotapes allegedly depicting approximately 1,500 wild marijuana plants growing on his farm in September of 1998, approximately a year after the seizure.

The government filed a motion in limine to exclude this evidence under Federal Rule of Evidence 403. In granting the government's motion the court reasoned that "evidence that there was wild marijuana growing on some portion of defendant's property on September 9,

1998, over a year after the search warrant was executed, is irrelevant to the allegations contained in [the] Indictment." App. vol. III, at 126 (Order, dated Nov. 19, 1998).

We review a district court's decision to exclude relevant evidence under Federal Rule of Evidence 403 for abuse of discretion. *See United States v. Castillo*, 140 F.3d 874, 884 (10th Cir.1998). Pursuant to this rule, "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403.

Here, the district court noted that the government admitted wild marijuana grows annually in numerous rural areas in Marshall County, Kansas, where Mr. Allerheiligen's property is located. Moreover, in the presentence report the probation officer agreed with Mr. Allerheiligen that "there were likely wild marihuana plants growing in the marihuana patchs [sic] which were seized from the defendant's property." App. vol. VIII, at 13, ¶ 37. However, the report further "concluded that [Mr. Allerheiligen] had adopted those marihuana plants as his own and cared for them as he did the plants that he personally planted" and, therefore, those plants were attributable to him. *Id.* Thus, the existence of wild marijuana in the area was not in dispute, thereby, demonstrating the minimal probative value of the proffered videotape evidence. Moreover, evidence regarding the condition of Mr. Allerheiligen's property a year after the seizure would likely have confused the issues or misled the jury.

Finally, the KBI made a videotape and took photographs of Mr. Allerheiligen's property during the marijuana seizure in 1997. Mr. Allerheiligen has not offered any legitimate explanation as to why the 1997 KBI videotape and photographs do not accurately reflect his property on the day of the seizure. Accordingly, we find no abuse of discretion in the court's decision to exclude any evidence regarding the 1998 videotapes allegedly depicting Mr. Allerheiligen's property a year after the seizure. Cf., *United States v. Culpepper,* 834 F.2d 879, 883 (10th Cir.1987) (upholding the trial court's denial of defendant's request to allow the jury to view the marijuana field two months after the seizure because rain had changed the field's condition and because there were undisputed photographs of the field on the day of the seizure).

C. Exclusion of Expert Witnesses Offered to Testify as to the Differences Between Marijuana Grown for Personal Use Versus Distribution

As stated previously, Mr. Allerheiligen's defense was that he only planted a few marijuana plants for personal use, not distribution. Because possessing a large quantity of drugs is a strong indicator of intent to distribute, he set out to prove he did not cultivate the 1,346 marijuana plants attributed to him. *See,* e.g., *United States v. Wood,* 57 F.3d 913, 918 (10th Cir.1995) ("A large quantity of the drug will support a reasonable inference that a defendant intended to distribute it."); *United States v. Eng,* 753 F.2d 683, 687 (8th Cir.1985) ("The harvesting of [over thirteen pounds] of marijuana is inconsistent with Eng's personal use claim.").

In support of his defense Mr. Allerheiligen sought to present three expert witness, Ed Rosenthal, Walt Carroll, and William Logan, to testify regarding the differences between marijuana grown for personal use and marijuana grown for commercial distribution. The district court excluded all three of Mr. Allerheiligen's expert witnesses, finding they were not qualified to testify on the subject matter of their proffered testimony. Mr. Allerheiligen contends exclusion of all three expert witnesses was in error.

A district court may allow expert testimony "[i]f [the expert's] scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702. The Supreme Court has held that Rule 702 imposes a special obligation upon a trial judge to ensure that all expert testimony, even non-scientific and experience-based expert testimony, is both relevant and reliable. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

In *Daubert*, the Court stated that, in determining reliability, the trial judge may consider: (1) whether a "theory or technique . . . can be (and has been) tested"; (2) whether it "has been subjected to peer review and publication"; (3) whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and (4) whether the theory or technique enjoys "general acceptance within a relevant scientific community." 509 U.S. at 593-94.

However, the Supreme Court has stressed that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire*, 526 U.S. at 152. "Thus, whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Id.* at 153. Accordingly, a trial judge's ruling on the admission or exclusion of expert testimony will not be overturned unless it is manifestly erroneous or an abuse of discretion. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 142, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); *United States v. Diaz*, 189 F.3d 1239, 1246 (10th Cir.1999).

1. Ed Rosenthal

At the hearing on the government's motion to exclude Mr. Rosenthal's testimony, defense counsel made a lengthy proffer regarding Mr. Rosenthal's qualifications and the subject matter of his testimony. In essence, Mr. Rosenthal would have testified "about the quantity and quality of marijuana plants which distinguishes personal use from commercial cultivation" and "the anticipated yield of the marijuana seized from [Mr. Allerheiligen's] property." App. vol. II, at 110 (Defendant's Witness List).

Mr. Rosenthal proffered similar testimony in *United States v. Kelley*, 6 F.Supp.2d 1168, 1179-85 (D.Kan.1998), which the court excluded. In Kelley, the court's decision to exclude the testimony was based on its finding that he was not qualified to testify on the issues of yield, intent,

general practices of outdoor marijuana growers, and processing and use of marijuana in Kansas. *See id.* at 1184-85.

The decision in Kelley was based in part on transcripts of Mr. Rosenthal's testimony in *State v. Hood* and *United States v. Wyman & Hadley*, D.Kan. No. 94-40038-01/02-RDR. In *Hood* the court characterized Mr. Rosenthal's testimony as a "serious disappointment" and "ideologically driven to the point where [the court thought Mr. Rosenthal] had no objectivity at all." *Kelley*, 6 F.Supp.2d at 1183-84 (quoting Trans. Aug. 20, 1993, p. 171). Similarly, in *Wyman and Hadley* the court expressed regret over allowing Mr. Rosenthal to testify. Specifically, Judge Rogers voiced concern over Mr. Rosenthal's qualifications and referred to his work as "almost voodoo research." *Id.* at 1184 (quoting Trans. January 27, 1995, at 98-100).

Here, the district court similarly "observe[d] several areas where [Mr.] Rosenthal's purported testimony extend[ed] beyond his demonstrated areas of specialized knowledge." App. vol. III, at 130. In excluding Mr. Rosenthal's testimony, the court explained:

> Even given the additional substantial information regarding [Mr.] Rosenthal provided to this court by the parties, the fact that [Mr.] Rosenthal writes books on marijuana growing and regularly writes a popular advice column for High Times magazine does not tell the court anything about the scientific reliability of his opinions expressed therein. There is no evidence that any of [Mr.] Rosenthal's writings on marijuana have been recognized as a valid research effort or reference book in the field of botany. Nor is there anything of record that would lead this

> court to believe that it should rely on readers of High Times magazine or others having an interest in growing marijuana as a valid indicator of reliability.
>
> Based upon the court's opinion in *Kelley*, the transcript from *Wyman and Hadley* and the affidavit of Dr. Mahmoud A. ElSohly, the Director of the Marijuana Project at the University of Mississippi since 1980, the court finds that [Mr.] Rosenthal's qualifications are largely a matter provable only through his own opinion. He lacks any academic background, formal education or training, and experience that would qualify him as an expert on the subject of growing, harvesting, and processing of marijuana. His unique exposure to these topics is limited to his self-directed efforts at reading reference works, talking with some researchers and growers, and then summarizing the work of others in to popular "how-to" guides.

Id. at 130-31.

The district court undertook a careful and thorough review of Mr. Rosenthal's qualifications and proffered testimony. In light of the "considerable leeway" we give trial judges "in deciding in a particular case how to go about determining whether particular expert testimony is reliable," we conclude the court's decision to exclude Mr. Rosenthal's testimony was not an abuse of discretion. *Kumho Tire*, 526 U.S. at 152; *see*, e.g., *Taylor v. Cooper Tire & Rubber Co.*, 130 F.3d 1395, 1397 (10th Cir.1997) (affirming district court's exclusion of expert testimony where, although the expert "was qualified generally in materials failure, particularly metals," the court found the expert was not qualified to testify as to the critical issue of

whether "the tire failure in [the] case was the result of a manufacturing defect"); *Broadcort Capital Corp. v. Summa Med. Corp.*, 972 F.2d 1183, 1195 (10th Cir.1992) (concluding exclusion of expert testimony was not an abuse of discretion where "[t]he district court found that [the expert's] general experience and education did not qualify [him] as an expert in the securities area."); *United States v. Chang*, 207 F.3d 1169, 1173 (9th Cir.2000) (holding "[i]t was not an abuse of discretion for the district court to determine that [the proffered expert's] 'practical experience in international finance' did not amount to practical experience determining whether a particular security is counterfeit, the fact at issue in th[e] case.").

2. Walt Carroll and William Logan

Mr. Allerheiligen argues the court also erred in excluding expert witnesses Mr. Carroll and Mr. Logan. Neither Mr. Carroll nor Mr. Logan appeared at the hearing on the government's motion to exclude both witnesses' testimony. Instead, Mr. Allerheiligen submitted their respective resumes and submitted a proffer of their testimonies.

Mr. Carroll has been a law enforcement officer for over twenty-five years and has served as an expert witness and training instructor in the area of drug detection, inderdiction [sic] and prosecution of drug cases. Mr. Allerheiligen submitted that Mr. Carroll would "testify as to the presence of wild marijuana on the Allerheiligen property; evidence of spraying in the marijuana field; his observations during his inspection of the Allerheiligen

property in 1997; pictures taken by him of the Allerheiligen property; [and] all other issues addressed in [Mr. Carroll's] report and affidavit." App. vol. II, at 108. Mr. Allerheiligen asserts Mr. Carroll's testimony was significant because he inspected Mr. Allerheiligen's property two weeks after the search and found no evidence of cultivation.

Mr. Logan is a criminal defense lawyer. He has called Mr. Rosenthal to testify on behalf of his clients in various cases. Mr. Allerheiligen sought to call Mr. Logan to "testify to [the] defining elements which constitute personal use of marijuana" and "the expected yield of the marijuana seized." App. vol. II, at 109.

After reviewing the proffered evidence, the court concluded "that the purported testimonies of [Mssrs.] Logan and Carroll extend[ed] beyond their respective demonstrated areas of specialized knowledge." App. vol. III, at 151. As with Mr. Rosenthal, the court found that "the information provided to [it] by the defendant t[old] the court nothing about the scientific reliability of the opinions proffered by [Mssrs.] Logan and Carroll." *Id.*

With respect to Mr. Carroll, the court found that his "credentials evidence no training, experience or schooling in matters specifically related to marijuana identification, marijuana eradication, marijuana processing, [and] marijuana use." *Id.* Moreover, the court found nothing in the record to justify relying on "Mr. Carroll's perusal of [Mr. Allerheiligen's] property after [the marijuana seizure] . . . as evidence of the yield of the plants seized." *Id.* at 152. As to Mr. Logan, the court stated, "[t]here is nothing of record that would lead this court to believe

that it should rely on Mr. Logan's former clients, members of the California criminal defense bar, California marijuana users or the readers of his articles as a valid indicator of reliability." *Id.*

The court carefully and meticulously reviewed the proffer of evidence submitted by Mr. Allerheiligen in support of Mssrs. Carroll and Logan, ultimately finding their proffered testimonies were not scientifically reliable. Our review of the record supports that finding. As stated previously, "the law grants the trial judge broad latitude to determine" what are "reasonable measures of reliability." *Kumho Tire*, 526 U.S. at 123. Accordingly, we conclude the court's decision to exclude the testimony of Mr. Carroll and Mr. Logan was not an improper exercise of its discretion.

D. Exclusion of Expert Testimony Regarding Defendant's Mental and Physical Condition

On the defense witness list, Mr. Allerheiligen listed Dr. Stuart Twemlow as an expert witness who would have testified as to Mr. Allerheiligen's "physical, medical and psychological condition." App. vol. II, at 110. Dr. Twemlow examined Mr. Allerheiligen pursuant to a court ordered evaluation as a condition of his pre-trial release. The defense also listed Dr. Matthew Schlotterback, who would have testified as to his knowledge of Mr. Allerheiligen's "medical history." *Id.* The government's motion in limine sought to exclude the testimony of both witnesses.

The district court granted the government's motion, finding that the "[Mr. Allerheiligen's] true intent [was] to

offer a 'justification' defense through the use of this testimony." App. vol. III, doc. 101, at 122. Mr. Allerheiligen had represented on the Omnibus Hearing Report that his sole defense was "general denial; put the government to proof," and did not list "justification as a defense." Thus, the court found that allowing the testimony would violate the Omnibus Hearing Report. Additionally, the court found the proffered testimony was akin to a medical necessity defense, which is not a proper defense to possession of marijuana with intent to distribute, the charge at issue in this case. Finally, the court found the testimony was irrelevant and collateral to the issues at trial and therefore would confuse and distract the jury. Upon this finding, the court excluded the testimony pursuant to Federal Rules of Evidence 401, 402, and 403.

On appeal, Mr. Allerheiligen asserts the court's finding that the testimony was offered as a justification or medical necessity defense was in error. He maintains the testimony was not offered to prove justification or to negate intent, but rather solely to prove he only grew a few marijuana plants for personal use, not distribution. Moreover, the testimony was relevant because it was offered to bolster the credibility of Mr. Allerheiligen's statements to KBI agents during the search of his property that he only grew a few marijuana plants for personal use.

As explained in the previous section, we review the exclusion of expert testimony for abuse of discretion and we will not overturn the court's decision unless it is manifestly erroneous. *See General Elec. Co.*, 522 U.S. at 142; *Diaz*, 189 F.3d at 1246. Without deciding whether all

of the court's reasons for excluding the proffered testimony were proper, we affirm the court's decision to exclude the testimony pursuant to Rule 403. Under Rule 403, "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403.

At the hearing on the government's motion to exclude testimony on Mr. Allerheiligen's psychiatric condition and medical history, defense counsel proffered the following testimony:

> [Mr. Allerheiligen] has a medical condition that causes chronic pain since the late 60s. [He] tried various prescription medications. [He] has a psychiatric/psychological problem that does not amount to the size of a problem as a bipolar disorder, but it causes extreme hyperactivity and periods of depression similar to what we would call manic depression. . . . He's had it since birth. . . . And only recently [Dr. Twemlow] has confirmed through his treatment and care of [Mr. Allerheiligen] that that disorder exists.
>
> [Mr. Allerheiligen] is currently on enough medication to shock almost anybody. . . . It maintains him at a level of functioning that allows him to participate on a day-to-day basis with his wife and his family and society. That is the type of testimony we anticipate out of [Dr. Schlotterback] and [Dr. Twemlow].
>
> This is not a new problem. It's a longstanding problem. It's a problem, which for almost 30 years he monitored and treated himself with

> marijuana. He has readily admitted that. That's never been an issue in this case.

App. vol. V, at 54-55.

The probative value of the proffered testimony on Mr. Allerheiligen's psychiatric condition and medical history was minimal at best. Establishing Mr. Allerheiligen is a chronic user of marijuana is only marginally relevant to whether he intended to distribute the large quantity of marijuana found on his property.

Further, the minimal probative value of this testimony is substantially outweighed by the likelihood it would inject collateral issues at trial that would confuse and mislead the jury. *See* Fed.R.Evid. 403. Regardless of Mr. Allerheiligen's true purpose for this testimony,

> psychiatric evidence (1) will only rarely negate specific intent, (2) presents an inherent danger that it will distract the jury from focusing on the actual presence or absence of mens rea, and (3) may easily slide into wider usage that opens up the jury to theories of defense more akin to justification, [therefore,] district courts must examine such psychiatric evidence carefully to ascertain whether it would, if believed, support a legally acceptable theory of lack of mens rea.

United States v. Cameron, 907 F.2d 1051, 1067 (11th Cir.1990) (internal quotations and citations omitted).

Moreover, Mr. Allerheiligen had acknowledged throughout that he is a chronic marijuana user and had already admitted to growing at least some of the marijuana on his property for personal use. As defense counsel conceded, Mr. Allerheiligen's personal use of marijuana has "never been an issue in this case." App.

vol. V, at 55. Thus, the proffered testimony was also partly cumulative. Accordingly, the district court's exclusion of the proffered psychiatric and medical history testimony under Rule 403 was not an abuse of discretion.

E. Evidence the Government Seized but Allegedly Failed to Preserve

The presentence report attributed 1,346 marijuana plants to Mr. Allerheiligen. *See* App. vol. VIII, at 14, ¶ 44. Mr. Allerheiligen alleges the government only seized a representative sample of these plants and failed to seize, preserve, or record any of the peat pots on the plants. Although Mr. Allerheiligen has framed the issue on appeal as whether "the district court abused its discretion in denying [his] motion to exclude testimony about evidence the government had seized but not preserved," his entire argument is evidently dedicated to the legal proposition that the government's alleged failure to preserve exculpatory evidence, i.e., the marijuana plants and the peat pots, denied him due process. After reviewing the record, we conclude Mr. Allerheiligen never presented this argument to the district court.

The motion Mr. Allerheiligen submitted to the district court was entitled "Motion In Limine To Exclude Testimony About Evidence Which Has Not Been Preserved And To Prohibit Any Testimony Regarding Opinions Based On Scientific, Technical, Or Other Specialized Knowledge." App. vol. III, at 1. Within this motion, Mr. Allerheiligen argued that because the government did not designate any witnesses as experts on its witness list, the witnesses should be prohibited from testimony based on

scientific, technical or specialized knowledge under Federal Rule of Evidence 702. He asserted that, as a result of the government's failure to designate any of the witnesses as experts, the proposed witnesses should be limited to testimony based on perception only, as opposed to opinion, as required under Rule 701. Accordingly, he argued, no witnesses should be allowed to speculate as to the number of cultivated marijuana plants or peat pots present on Mr. Allerheiligen's property during the seizure that were not videotaped, photographed, recorded or otherwise preserved.

Although the motion contains a citation to *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), which outlines the standard for determining when the government's failure to preserve, or destruction of, evidence violates due process, it is cited for the more general proposition that "[t]he government has a duty to preserve all evidence that is expected to play a significant role in a suspect's defense." App. vol III, at 3. The motion makes no allegation of a due process violation, nor does it attempt to argue the elements of the *Trombetta* test. More importantly, Mr. Allerheiligen never alleged in his motion that the government failed to preserve or destroyed exculpatory evidence, which is the sole focus of Mr. Allerheiligen's argument on appeal.

The district court's order lends support to our construction of Mr. Allerheiligen's motion. In denying the motion, the court explained:

> After establishing to the court's satisfaction that a witness can offer an opinion as a lay witness under Federal Rule of Evidence 701, witnesses may testify to their relevant observations, upon

> proper foundation, whether contained in a report or not. If an agent offers testimony not contained in a report, this may be inquired into on cross-examination to challenge the credibility of the statement. This goes to the weight of the evidence and not to its admissibility.

App. vol. III at 147 (Order, Nov. 19, 1998). The court made no mention of Mr. Allerheiligen's current due process argument and did not discuss or cite to any cases regarding such.

Because Mr. Allerheiligen failed to raise his due process argument to the district court, our review is limited to plain error. *See United States v. Orr*, 864 F.2d 1505, 1508 (10th Cir.1988) ("On appeal we will only consider the specific ground of the evidentiary objection in the trial court, unless the ground not raised constitutes plain error resulting in manifest injustice.") (internal quotations omitted); *see* also *Goulah v. Ford Motor Company*, 118 F.3d 1478, 1483 (11th Cir.1997) ("An objection on one ground will not preserve an error for appeal on other grounds."). Plain error is that which affects substantial rights and undermines the "fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). The plain error doctrine is to be " 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " *United States v. Oberle*, 136 F.3d 1414, 1422 (10th Cir.1998) (quoting *United States v. Frady*, 456 U.S. 152, 163 n. 14, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)). Mr. Allerheiligen cannot establish plain error occurred here.

Specifically, Mr. Allerheiligen takes issue with the government's failure to preserve the peat pots. He argues, "[h]ad [the government] seized all of the marijuana plants with peat pots, it would have either supported [his] claim that he only planted 12-15 plants, or disproved such a claim." Aplt's Br. at 27. However, to establish a violation of § 841(a)(1), the government did not need to prove Mr. Allerheiligen actually planted the marijuana, only that he possessed it with the intent to distribute. *See United States v. Silver*, 84 F.3d 1317, 1321-22 (10th Cir.1996); App. vol. V, at 41 (defense attorney acknowledging Mr. Allerheiligen "[didn't] have to grow [the marijuana] in order to possess it with the intent to distribute"). Moreover, the existence or lack of peat pots was not necessary to attribute the marijuana plants to Mr. Allerheiligen for purposes of sentencing. As stated previously, the presentence report concluded Mr. Allerheiligen "had adopted [the wild] marihuana plants as his own and cared for them as he did the plants that he personally planted," and, therefore, considered those plants in determining his base offense level. App. vol. VIII, at 13, ¶ 37. Thus, the peat pot evidence was only potentially exculpatory.

When potentially exculpatory evidence has not been preserved, in order to establish a due process violation, the defendant must show the government acted in bad faith. *See United States v. Gomez*, 191 F.3d 1214, 1219 (10th Cir.1999) (citing *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)). Here, Mr. Allerheiligen alleges "the Kansas and federal authorities were well aware of the importance of the number of plants seized," and "the methodology used to count the plants . . . was

unclear and uncertain." Aplt. Br. at 29. He further argues the government's explanation for failing to preserve all of the marijuana plants including the peat pots, namely, lack of storage space and difficulty in pulling each plant, evinces bad faith.

We are not convinced that this evidence alone is sufficient to establish the government acted in bad faith. *See United States v. Deaner*, 1 F.3d 192, 201 (3d Cir.1993) (concluding that even though the government destroyed seized marijuana because of limited storage space instead of retaining a representative sample as required by statute, the defendant could not establish bad faith); *United States v. Beldon*, 957 F.2d 671, 673-74 (9th Cir.1992) (concluding the government did not act in bad faith where officers pulled marijuana plants from their pots or cut them above the roots, and failed to preserve the root systems because it was routine police practice and there was a lack of storage space); *see*, e.g., *Gomez*, 191 F.3d at 1219 (no due process violation where the defendant could not show the police destroyed marijuana in bad faith).

Because Mr. Allerheiligen cannot establish the KBI acted in bad faith in failing to preserve potentially exculpatory evidence, his due process claim fails. Accordingly, he cannot establish plain error.

F. Plea Agreement

Mr. Allerheiligen challenges his sentence, alleging the government breached the plea agreement. "Whether government conduct has violated a plea agreement is a question of law . . . we review de novo." *United States v.*

Hawley, 93 F.3d 682, 690 (10th Cir.1996). Plea bargains are governed by contract principles, and if any ambiguities are present, they will be resolved against the drafter. *See id.* The defendant has the burden of proving by a preponderance of the evidence the underlying facts establishing the prosecution's breach of the plea agreement. *See Cunningham v. Diesslin*, 92 F.3d 1054, 1059 (10th Cir.1996). Because Mr. Allerheiligen asserts the government breached the plea agreement for the first time on appeal, however, our review is limited to plain error. *See United States v. Peterson*, No. 99-2042, 2000 WL 725478, *1 (10th Cir. June 6, 2000).

Pursuant to the plea agreement the government agreed not to oppose a contested sentencing, thereby allowing Mr. Allerheiligen to rebut the number of marijuana plants the presentence report attributed to him for purposes of calculating his offense level. The government also agreed not to oppose application of the safety valve provisions.

Mr. Allerheiligen contends that during a chambers meeting prior to sentencing, the government "sided with the court" when the court announced to both parties' counsel that it would not be inclined to apply the safety valve if Mr. Allerheiligen contested the number of marijuana plants at sentencing. Aplt. Br. at 30. Mr. Allerheiligen asserts this constituted a breach of the government's agreement not to oppose a contested sentencing on the number of plants attributable to him.

Following the in-chambers meeting, Mr. Allerheiligen filed a "Motion To Reconsider Rulings Made In Chambers With Regard To Sentencing Issues." App. vol. 3 at 156.

Although Mr. Allerheiligen did not argue within this motion that the government breached the plea agreement, the motion did present the district court with the factual issue of what occurred during the in chambers meeting.

In its order denying Mr. Allerheiligen's motion to reconsider, the district court made the following findings with respect to what occurred during the in-chambers meeting:

> The conversation in chambers prior to sentencing was held primarily for the defendant's benefit. The court made no rulings in chambers, but merely indicated to counsel for both sides that the court was inclined to apply the safety valve provision to this case. The court further indicated to counsel that the court did not believe defendant would be eligible for the safety valve provision if defendant continued to argue his objections with regard to the number of marijuana plants because he would no longer meet the fifth requirement for application of the safety valve by truthfully providing to the government all information and evidence the defendant has concerning the offense. See USSG § 5C1.2 and 18 U.S.C. § 3553(f). This belief was based not only upon the court's review of the KBI videotape of the counting of the marijuana plants, but also on the court's review of [inconsistent] statements provided by the defendant prior to sentencing.

App. vol. III, at 185-86 (Order, dated May 6, 1999). The court then concluded:

> Upon review of the transcript of the sentencing hearing, the court finds that defense counsel never argued to the court that defendant should

> be allowed to contest the number of plants and still be eligible for the safety valve. Defendant's counsel also did not voice any objection, either in chambers or during the sentencing hearing, with respect to the court's view of the applicability of the safety valve. Therefore, the defendant did not make any kind of record regarding the applicability of the safety valve if he contested the number of plants. If the defendant believed that he should be allowed to contest the number of plants and still remain eligible for the safety valve, then he should have raised that argument with the court so that it could be addressed on the record.

Id. at 186-87.

There is nothing in the record that would permit us to review the court's findings with respect to what occurred during the in chambers meeting, or Mr. Allerheiligen's contention that the government breached its agreement through statements made therein. Mr. Allerheiligen did not request that the conversation in chambers be placed on the record, nor did counsel attempt to make any sort of record once the court was in session for the sentencing hearing. Where the evidentiary record is insufficient to permit assessment of an appellant's claims of error we must affirm. *See Deines v. Vermeer Mfg. Co.*, 969 F.2d 977, 979-80 (10th Cir.1992); see also 10th Cir.R. 10.3(B) ("When the party asserting an issue fails to provide a record sufficient for considering that issue, the court may decline to consider it.").

IV. CONCLUSION

For the foregoing reasons we AFFIRM Mr. Allerheiligen's conviction and sentence.

APPENDIX B

United States District Court,
D. Kansas.

UNITED STATES OF AMERICA,
Plaintiff,

v.

Mark Henry ALLERHEILIGEN,
Defendant.

No. 97-40090-01-DES.

Nov. 19, 1998.

Robert L. Pottroff, Myers, Pottroff & Ball, Manhattan, KS, William K. Rork, Rork Law Office, Topeka, KS, for Mark Henry Allerheiligen, defendant.

Gregory G. Hough, Office of United States Attorney, Topeka, KS, for U.S.

MEMORANDUM AND ORDER

SAFFELS, J.

This Memorandum and Order is issued to memorialize the court's rulings on the following pretrial motions at the hearing held on November 2, 1998: (1) Government's Motion in Limine Regarding Psychiatric and/or Psychological Testimony (Doc. 59); (2) Government's Motion in Limine Regarding Defendant's Medical Condition (Doc. 60); (3) Government's Motion in Limine Regarding Defendant's Videotape (Doc. 61); (4) Government's Motion in Limine Regarding Rehash of Suppression Hearing Evidence Regarding Legal Matters Before the Jury (Doc. 64); (5) Government's Motion in Limine to Exclude Proffered Testimony of Ed Rosenthal (Doc. 65); (6) Government's Motion in Limine Regarding Condition of Defendant's

Property Following the Search, Survey of Defendant's Property, Condition of Defendant's Property That Was Returned to Him, Marijuana Plant Yield, Elements Which Constitute Personal Use of Marijuana, Marijuana Species and the Practices for Growth and Cultivation of Marijuana for Personal and/or Commercial Use, and the Condition of the Farm on 9/4/98 (Doc. 66); (7) Defendant's Motion for Additional Time to Conduct Voir Dire (Doc. 67); (8) Defendant's Motion in Limine Regarding Character Evidence of the Defendant (Doc. 68); (9) Defendant's Motion in Limine Regarding Any Allegations or Inferences of Drug Proceeds with Regard to Property Seized from Defendant's Residence and Bank Accounts (Doc. 69); (10) Defendant's Motion for Protective Order (Doc. 72); (11) Defendant's Motion in Limine to Exclude Testimony about Evidence Which Has Not Been Preserved and to Prohibit Any Testimony Regarding Opinions Based on Scientific, Technical, or Other Specialized Knowledge (Doc. 73); (12) Government's Motion for Decision on the Briefs (Doc. 79); (13) Government's Motion in Limine Regarding William Logan and Walt Carroll and for Decision on the Briefs (Doc. 80); and (14) Defendant's Motion for Sanctions (Doc. 90).

After reviewing the motions and responses, the evidence submitted in support of each motion, the arguments presented by the parties and being fully advised in the premises, the court makes the following findings and rulings.

I. Government's Motion in Limine Regarding Psychiatric and/or Psychological Testimony (Doc. 59)

The government asserts that the defendant's witness list indicates that defendant intends to call Stuart Twemlow, M.D., Psychiatry, 5040 S.W. 28th Street, Topeka, Kansas, in his case-in-chief to testify regarding defendant's "physical, medical and psychological condition." The defendant does not challenge this representation.

In his response, defendant provided a page of defendant's pretrial release form which includes a condition that defendant "participate in a program of substance abuse at the direction of the U.S. Probation Office." Defendant has not provided the court with any examination reports which were prepared by Dr. Twemlow. At oral argument, defense counsel stated that Dr. Twemlow would testify that defendant has an on-going condition of "hyperactivity" and "depression" for which he has imbibed marijuana. Dr. Twemlow would testify that this has created a "chronic" habit of personal marijuana use over the years.

It is apparent to the court that defendant's true intent is to offer a "justification" defense through the use of this testimony. The court notes that in the Omnibus Hearing Report, defendant represented to the court and the government that his sole defense is "general denial; put the government to proof." "Justification" is an option to defense counsel in the Omnibus Hearing Report. This defense option was not selected by the defendant. Defendant has never modified this original representation to the court and government. Even now, defendant has not

sought to amend the Omnibus Hearing Report. The court finds that to allow this testimony in the form proffered now by defendant would be in violation of the Omnibus Hearing Report. *See United States v. Russell*, 109 F.3d 1503, 1507-12 (10th Cir.1997), cert. denied, 117 S.Ct. 2525 (1997) (excluding testimony of defendant's witnesses rather than granting continuance for failure to disclose witnesses prior to trial in violation of court order was not abuse of discretion, even if defendant did not act in bad faith).

The determination of whether expert testimony should be admitted rests within the sound discretion of the trial court. *United States v. Barton*, 731 F.2d 669, 672 (10th Cir.1984). Prior to trial, the court must carefully scrutinize any psychiatric evidence the defendant intends to offer to determine its admissibility. *See United States v. Cameron*, 907 F.2d 1051, 1067 (11 th Cir.1990); *United States v. Pohlot*, 827 F.2d 889, 890 (3d Cir.1987). Excluding psychiatric testimony is well within the court's discretion, especially when the evidence is, in reality, offered to excuse the crime, and not to negate intent. *See*, e.g., *United States v. Holsey*, 995 F.2d 960, 962 (10 th Cir.1993) (court excluded expert testimony regarding defendant's stress-induced dissociative state); *United States v. Esch*, 832 F.2d 531, 535 (10 th Cir.1987) (court excluded expert testimony regarding defendant's dependent personality).

Defendant is charged with possession with intent to distribute marijuana. Defendant's use of marijuana to relieve his "hyperactivity" and "depression", i.e., an availability of marijuana for medical purposes, is prohibited by *Schedule I. Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131,

1134 (D.C.Cir.1994). Additionally, "medical necessity" is not a defense to the crime alleged in the Indictment. Courts have rejected requests for such instructions. *See United States v. Griffin*, 909 F.2d 1222, 1224 (8 th Cir.1990), cert. denied, 498 U.S. 1038 (1991) (rejecting "necessity" defense to heroin possession); *United States v. Burton*, 894 F.2d 188, 191 (6 th Cir.1990) (rejecting "medical necessity" defense to growing, possessing, and using marijuana). Defendant offers no federal case in which such an instruction was even given, much less approved on appeal.

Because defendant attempts to offer this evidence to justify his possession of the marijuana, and because this is barred by Schedule I, the proffered testimony is irrelevant. It does not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. "Evidence which is not relevant is not admissible." Fed.R.Evid. 402. Finally, because the proffered testimony is not relevant, the substance of the proffered testimony is collateral to the issues of this trial and would only serve to confuse and distract the jury. Rule 403 of the Federal Rules of Evidence commands the exclusion of "such detours and excursions." *United States v. Buljabasic*, 808 F.2d 1260, 1268 (7 th Cir.1987). Therefore, Government's Motion in Limine Regarding Psychiatric and/or Psychological Testimony (Doc. 59) is granted.

II. Government's Motion in Limine Regarding Defendant's Medical Condition (Doc. 60)

The government asserts that the defendant's witness list includes Matthew Schlotterback, M.D., who will allegedly testify regarding "his knowledge of defendant's medical history." Defendant does not dispute this representation of Dr. Schlotterback's proffered testimony. At the hearing on this motion, defense counsel represented to the court that Dr. Schlotterback would testify that defendant has suffered "chronic pain" for a period of years. Defense counsel then asserted that it was for these reasons that defendant had become a chronic personal user of marijuana.

Again, as with Dr. Twemlow's proffered testimony, it is clear to the court that defendant's true purpose is to attempt to justify his possession and use of the marijuana seized from his residence on September 3, 1997. For the same reasons articulated above in granting Government's Motion in Limine Regarding Psychiatric and/or Psychological Testimony, Government's Motion in Limine Regarding Defendant's Medical Condition (Doc. 60) is also granted.

III. Government's Motion in Limine Regarding Defendant's Videotape (Doc. 61)

The government asserts that the defendant's witness list includes witnesses who will allegedly testify regarding "the 9/19/98 video showing the eradication of wild

marijuana on defendant's farm." The government submits that this evidence is inadmissible pursuant to Federal Rule of Evidence 403. At the hearing on this motion, defense counsel did not challenge the government's allegations regarding the substance of these witnesses' testimonies. In fact, defense counsel represented that there were actually two videotapes which show wild marijuana plants growing in the area of defendant's property where the marijuana at issue in this case was seized. Both videotapes were made approximately one year after the search warrant in this case was executed. The defendant alleges that all of the marijuana plants shown in these videotapes are wild marijuana plants.

Defendant is charged with possession with intent to distribute marijuana. Defendant admits to personal use of marijuana. Defendant informed agents at the time the search warrant was executed that at least some of the marijuana plants seized had peat pots on them and that he raised and transplanted them. At that time, defendant also informed agents that he had planted some seeds expecting corn and sunflowers, but that the seeds grew marijuana.

The court finds that evidence that there was wild marijuana growing on some portion of defendant's property on September 9, 1998, over a year after the search warrant was executed, is irrelevant to the allegations contained in this Indictment. Therefore, Government's Motion in Limine Regarding Defendant's Videotape (Doc. 61) is granted in regard to both videotapes.

IV. Government's Motion in Limine Regarding Rehash of Suppression Hearing Evidence Regarding Legal Matters Before the Jury (Doc. 64)

In this motion, the government alleges that defendant's witness list demonstrates his intent to seek testimony from six proposed witnesses regarding "other issues previously testified to in the suppression hearing." At the hearing on this motion, defense counsel did not dispute the substance of the proffered testimonies of these witnesses. The court notes that several of these witnesses did not actually testify at the suppression hearing in this matter. The government argues that this evidence is merely offered to "rehash" legal issues previously decided by the court in its order denying defendant's motion to suppress. Thus, the government argues that this proffered evidence is irrelevant and inadmissible pursuant to Federal Rules of Evidence 401, 402, and 403.

Issues of law are the province of the court. Issues of fact are the province of the jury. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 387-88 (1996). Legal issues contained in motions to suppress are to be decided by the courts. *See*, e.g., *United States v. McCloud*, 127 F.3d 1284, 1286 (10 th Cir.1997).

This court has previously heard all of defendant's challenges to the search and seizure issues related to this matter. The court has decided those issues against the defendant. The court finds that it would serve no legitimate purpose to rehash those issues and evidence solely related to those legal issues previously decided by the court in its order. Therefore, based upon the substance of

these witnesses' proffered testimonies and the additional proffers and arguments of counsel at the hearing on this motion, the court finds that allowing this evidence would violate the spirit of Rule 403. This evidence would merely distract the attention of the jury from the true issues within its province and would confuse the jury by directing its attention to legal matters already decided by the court. Thus, to the extent that these witnesses' respective testimonies are offered to address legal issues already decided by the court, they shall not be allowed. As a result, Government's Motion in Limine Regarding Rehash of Suppression Hearing Evidence Regarding Legal Matters Before the Jury (Doc. 64) is granted.

V. Government's Motion in Limine to Exclude Proffered Testimony of Ed Rosenthal (Doc. 65)

In this motion, the government seeks an order excluding the proffered testimony of Ed Rosenthal, citing *United States v. Kelley*, 6 F.Supp.2d 1168, 1179-85 (D.Kan.1998) (barring proffered trial testimony of Ed Rosenthal regarding marijuana plant, cultivation and growing of it, general practices of outdoor marijuana growers, processing and use of marijuana and yield of marijuana plants). Defendant opposes this motion and, in reliance upon an updated resume from Rosenthal, an affidavit of Rosenthal, and reviews of Rosenthal's works by various newspapers, submits that he is qualified as an expert or, in the alternative, is qualified based upon his personal experiences with marijuana.

After carefully reading and considering the transcript involving Rosenthal's testimony in *United States v. Wyman*

and Hadley, D. Kan. No. 94-40038-01/02-RDR; the motions, responses and evidence submitted on the government's motion in limine regarding Rosenthal in *United States v. Kelley and McCormick*, D. Kan. No. 97-40024-01/02-SAC; the evidence submitted with the government's motion in limine in this case; the evidence submitted by the defendant in his response to the government's motion in this case; the evidence, oral and documentary proffers submitted by defendant, and arguments submitted by the parties at the hearing on this motion on November 2, 1998, the court believes it is in a position where it can perform the gatekeeping function required by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Federal Rule of Evidence 702.

As previously stated, a district court has wide latitude in admitting or excluding expert testimony. *See Barton*, 731 F.2d at 672. The testimony of an expert must be relevant under Federal Rule of Evidence 401. Its probative value must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Fed.R.Evid. 403. Furthermore, the party offering the expert testimony has the burden of laying a foundation for its admission. *United States v. Williams*, 95 F.3d 723, 729 (8 th Cir.1996), cert. denied, 117 S.Ct. 750 (1997).

In any case where expert testimony is proffered, the trial judge has the gatekeeping function of determining whether the testimony is not only relevant, but reliable. *Kelley*, 6 F.Supp.2d at 1182. In a case where the expert testimony is based solely upon experience or training, the

individual *Daubert* factors are unnecessary, but the trial judge still must make a preliminary finding that proffered expert testimony is both relevant and reliable. *Id.* The court realizes that one can be an expert by reason of experience and knowledge acquired on the job.

The information before the court shows that Rosenthal has no college degrees or formal education in chemistry, botany, biology, or any other field related to the cultivation of marijuana. The defendant does not dispute this. Furthermore, as did the court in *Kelley*, this court observes several areas where Rosenthal's purported testimony extends beyond his demonstrated areas of specialized knowledge.

Even given the additional substantial information regarding Rosenthal provided to this court by the parties, the fact that Rosenthal writes books on marijuana growing and regularly writes a popular advice column for High Times magazine does not tell the court anything about the scientific reliability of his opinions expressed therein. There is no evidence that any of Rosenthal's writings on marijuana have been recognized as a valid research effort or reference book in the field of botany. Nor is there anything of record that would lead this court to believe that it should rely on readers of High Times magazine or others having an interest in growing marijuana as a valid indicator of reliability.

Based upon the court's opinion in *Kelley*, the transcript from *Wyman and Hadley* and the affidavit of Dr. Mahmoud A. ElSohly, the Director of the Marijuana Project at the University of Mississippi since 1980, the court finds that Rosenthal's qualifications are largely a matter

provable only through his own opinion. He lacks any academic background, formal education or training, and experience that would qualify him as an expert on the subject of growing, harvesting, and processing of marijuana. His unique exposure to these topics is limited to his self-directed efforts at reading reference works, talking with some researchers and growers, and then summarizing the work of others into popular "how-to" guides.

Before the court can conclude that Rosenthal's testimony is reliable as a result of these self-directed efforts, there must be a foundation from which the court can find that Rosenthal has the training or background for such research and that Rosenthal's methods for conducting this research were reliable. The court is not persuaded, from reading the transcript in *Wyman and Hadley* and the additional materials now supplied regarding Rosenthal's training, background and methods for conducting his research, that this foundation has been laid.

Even assuming that such a foundation is laid and Rosenthal is able to demonstrate a specialized knowledge concerning the marijuana plant and the cultivation and growing of it, the court would not allow Rosenthal to testify on the issues of yield and intent based on the foundation before this court. Rosenthal's testimony does not appear to be based on any information of a type reasonably relied upon by experts in that field. While Rosenthal offers what he believes are "conservative estimates," without a factual basis for them, they are nothing short of arbitrary opinions. " 'An expert's opinion is helpful only to the extent the expert draws on some special skill, knowledge, or experience to formulate [his] opinion; the opinion must be an expert opinion (that is, an

opinion informed by the witness's expertise) rather than simply an opinion broached by a purported expert.' " *United States v. Hall*, 93 F.3d 1337, 1343 (7 th Cir.1996) (quoting *United States v. Benson*, 941 F.2d 598, 604 (7 th Cir.1991)).

As for the general practices of outdoor marijuana growers, the court also finds an inadequate foundation for Rosenthal's testimony on this subject. Rosenthal's assertions that he has talked with "many" outdoor growers and that the practices of growing marijuana are uniform from state to state does not make one an expert on the general practices of outdoor growers in Kansas.

This court, as did the court in *Kelley*, recognizes that Rosenthal's obvious bias towards those charged with marijuana offenses does not disqualify him from becoming an expert. However, this court concurs with the *Kelley* court's finding that Rosenthal's self-created advocacy role can be just cause for taking more care in determining his qualifications, the relevance and reliability of his opinions, and the factual foundation for his opinions. The court also concurs with the other findings of fact and conclusions of law, regarding Ed Rosenthal, contained in the court's decision in *United States v. Kelley*, 6 F.Supp.2d 1168, 1179-85 (D.Kan.1998).

Based upon the information provided to the court, it appears to the court that Rosenthal's proffered testimony lacks objectivity. Furthermore, in *Wyman and Hadley*, the court expressed its serious reservations with Rosenthal's qualifications, indicating that "[i]t's almost voodoo research we're talking about here." (*Wyman and Hadley* Tr. January 27, 1995 at 98-100). The court concurs with Judge

Rogers' assessment. Therefore, Government's Motion in Limine to Exclude Proffered Testimony of Ed Rosenthal (Doc. 65) is granted.

VI. Government's Motion in Limine Regarding Condition of Defendant's Property Following the Search, Survey of Defendant's Property, Condition of Defendant's Property That Was Returned to Him, Marijuana Plant Yield, Elements Which Constitute Personal Use of Marijuana, Marijuana Species and the Practices for Growth and Cultivation of Marijuana for Personal and/or Commercial Use and the Condition of the Farm on 9/4/98 (Doc. 66)

In this motion, the government challenges the defendant's proffered evidence concerning the following matters: (A) the condition of defendant's property following the search; (B) the survey of defendant's property; (C) the condition of defendant's property that was returned to him; (D) marijuana plant yield; (E) elements which constitute personal use of marijuana; (F) marijuana species; (G) the practices for growth and the cultivation of marijuana for personal and/or commercial use; and (H) the condition of the defendant's farm on September 4, 1998. The court shall discuss each issue separately.

A. Condition of Defendant's Property Following the Search

The concerns raised by the government's motion were modified orally at the hearing on this motion to specifically address evidence proffered to show that agents "tore up defendant's property," or were over-

zealous in their search and evidence that the property returned to defendant was not in substantially the same condition as when it was seized. However, defendant has not proffered evidence to support any such allegations. Defendant has offered no proper purpose or explanation for such evidence.

The court recognizes that agents executing the search warrant obviously went through defendant's buildings and belongings in search of evidence authorized by the search warrant. To effectuate this, officers and agents had to disturb things from their original places in search of relevant evidence. Likewise, items seized as evidence are tested in laboratories and/or stored in evidence areas in conditions unlike their normal surroundings. It would not be unusual for items seized and subsequently tested or stored in evidence areas to be returned to their owners in a different condition than when the items were seized. If property was unnecessarily defaced or destroyed, the officers' actions may give rise to some cause of action wholly unrelated to a subsequent criminal prosecution; however, defendant offers no reason why such evidence would be relevant in the trial of this matter.

The court finds that this is not relevant evidence and shall not be allowed. This is evidence collateral to the issues of this trial, and very likely would cause the jury great sympathy for the defendant in the minds of the jury. Given its lack of relevance, Rule 403 commands the exclusion of "such detours and excursions." *Buljabasic*, 808 F.2d at 1268.

Defendant asserts in his response to this motion that "the condition of defendant's property after the search

where there is wild marijuana is highly relevant." The court disagrees. The officers and agents that testified at the hearing on the motion to suppress testified that they seized cultivated marijuana plants, not wild marijuana plants. Government counsel reiterated this at the hearing on this motion. The presence of additional wild marijuana plants on the property after the search is certainly reasonable if officers and agents only seized what they believed were cultivated marijuana plants. However, the court will allow evidence that wild marijuana was present on defendant's property immediately after the search of defendant's residence, to the extent that defendant can show its relevance at trial. Thus, the government's motion in limine regarding the condition of defendant's property, as modified orally at the hearing and consistent with this order, is granted.

B. Condition of Defendant's Property That Was Returned to Him

Defendant asserts that evidence of the condition of the property which was returned to him is relevant "in case of a dispute regarding what was taken from the defendant's home." Defendant surmises that agents from the Kansas Bureau of Investigation ("K.B.I.") may testify untruthfully regarding gold coins seized from his residence and later returned to him. The court finds no reason to presume that K.B.I. agents will testify untruthfully. Additionally, no such dispute was evidenced by the parties at the hearing in this matter. There is no reason to believe that this evidence is now relevant.

For the reasons stated above, the government's motion in limine regarding the condition of defendant's property that was returned to him is granted, subject to reconsideration by the court during the trial of this matter. Should this evidence become relevant, it shall be allowed.

C. Survey of Defendant's Property

Neither the defendant nor the government challenged that the defendant owns the property that was searched on September 3, 1997. Defendant has not proffered a proper purpose for this evidence. It is wholly collateral to the issues this jury is to decide. Thus, presentation of this evidence would be a waste of time and could confuse the issues before the jury. Evidence of the survey of defendant's property shall not be allowed absent a showing of relevance. Thus, the government's motion in limine regarding the survey of defendant's property is granted.

D. Marijuana Plant Yield

Defendant has included three witnesses on his witness list whom he represents will testify regarding yield of marijuana plants generally, and the marijuana plants seized from his residence specifically. Defendant has represented to the court that this proffered testimony is relevant to the issue of possession with intent to distribute as opposed to simple possession of marijuana.

The court notes that evidence regarding "yield," at one time, would have been appropriate at defendant's

sentencing. Such is no longer the case. *See United States v. Robinson*, 35 F.3d 442, 447 (9 th Cir.1994), cert. denied, 513 U.S. 1197 (1995) ("the guidelines formulation is not dependent on yield"). *See also United States v. Beaver*, 984 F.2d 989, 991 (9 th Cir.1993) (rejecting argument that weight or potential yield of marijuana plants is relevant under 21 U.S.C. § 841(b)(1)). The sex of the plants, the yield of the plants and the variety of the plants are not elements of a violation of 21 U.S.C. § 841(a)(1). Thus, this evidence does not appear to be relevant at the trial of this matter. Furthermore, such testimony at trial will merely confuse and mislead the jury regarding collateral matters. The court does not believe that sentencing issues, such as plant yield, are proper matters for the jury's consideration. Therefore, the government's motion in limine with regard to marijuana plant yield is granted.

E. Elements Which Constitute Personal Use of Marijuana

The government next seeks an order barring defendant's proffered testimony regarding "elements which constitute personal use of marijuana." Personal use of marijuana may, in an appropriate case, justify an instruction to the jury regarding simple possession of marijuana in violation of 21 U.S.C. § 844. Simple possession of marijuana is a lesser included offense of possession with intent to distribute marijuana. *See* generally, *United States v. Lacey*, 86 F.3d 956, 970 (10 th Cir.1996).

Defendant filed a belated proposed jury instruction regarding simple possession of marijuana on November 4, 1998, the day of trial and one day after arguments on

these motions. Prior to defense counsel announcing at the hearing on November 2, 1998, that some of the evidence named in the government's motions in limine were for the purpose of seeking an instruction on simple possession of marijuana, the court was unaware that defendant intended to allege personal use.

The court will instruct the jury on the essential elements of the offense alleged in the violation. If appropriate, the court will instruct the jury on the elements of the offense of simple possession of marijuana, the lesser included offense.

> Defendant is entitled to a lesser included offense instruction if (1) there was a proper request; (2) the lesser included offense includes some but not all of the elements of the offense charged; (3) the elements differentiating the two offenses are in dispute; and (4) a jury could rationally convict the defendant of the lesser offense and acquit him of the greater offense.

United States v. Moore, 108 F.3d 270, 272 (10 th Cir.1997) (citing *Fitzgerald v. United States*, 719 F.2d 1069, 1071 (10th Cir.1983)). However, the court finds that to allow a lay witness's opinion testimony regarding the elements of the offense would be inappropriate. Thus, the court grants the government's motion in limine regarding the elements which constitute personal use of marijuana.

F. Marijuana Species

The government next seeks an order barring defendant's proffered testimony regarding marijuana species. Title 21, United States Code, Section 841(a)(1) makes it

illegal to possess with intent to distribute or dispense marijuana, regardless of species. Thus, evidence of marijuana plant species does not appear relevant for the jury's consideration. The Congressional prohibition against marijuana was intended to apply to all forms of marijuana. *United States v. Dinapoli*, 519 F.2d 104, 106 (6th Cir.1975). It appears clear from the legislative history of this law "that Congress meant to outlaw all plants popularly known as marijuana to the extent those plants possessed THC," regardless of species. *United States v. Walton*, 514 F.2d 201, 203-04 (D.C.Cir.1975). Therefore, the court grants the government's motion in limine regarding defendant's proffered testimony regarding marijuana plant species.

G. Practices for Growth and Cultivation of Marijuana for Personal Use and/or Commercial Use

The government next seeks an order barring defendant's proffered expert testimony regarding the practices for growth and cultivation of marijuana for personal and/or commercial use. The court notes that defendant has proffered only three witnesses to testify regarding this matter: Mr. Logan, Mr. Rosenthal and Mr. Carroll. For the reasons stated in part V of this order concerning Mr. Rosenthal and in part XIII concerning Mr. Logan and Mr. Carroll, the court finds that the defendant has failed to meet his burden regarding each of the three proffered expert testimonies. Thus, the court grants the government's motion in limine regarding defendant's proffered expert testimony regarding the practices for growth and

cultivation of marijuana for personal and/or commercial use.

H. Condition of the Farm on 9/4/98

Finally, the government seeks an order barring defendant's proffered testimony regarding the condition of his property on September 4, 1998. The court notes that this is just over one year after the search of defendant's residence which gave rise to this Indictment. Defendant's response to the government's motion asserts that this evidence is relevant because "[t]he areas from which marijuana was seized looks the exact same this year, as it did last year" and "because law enforcement officials testified there was no wild marijuana on the [sic] property the day of the search."

At the hearing on this motion, both the government and defense counsel admitted that wild marijuana grows in numerous rural areas of Marshall County, Kansas, and that it will recur each year. This is not a disputed issue. Neither does it appear to be a fact in consequence, given that the government's theory of the case is cultivated marijuana, not wild marijuana. The evidence before the court is that officers and agents chopped down the marijuana plants with machetes or uprooted them entirely. Defendant alleges that officers and agents left behind wild marijuana on defendant's property.

Based upon the defendant's proffer at the hearing in this matter, the court finds that this evidence has no relevant value. It does not have any tendency to make the

existence of a fact that is of consequence to the determination of this action more or less probable. Fed.R.Evid. 401. In fact, the proffer of wild marijuana is not disputed at all. "Evidence which is not relevant is not admissible." Fed.R.Evid. 402. While the court could grant the government's motion in limine for this reason alone, the court has also carefully studied the defendant's proffer of this evidence and finds that any purported probative value is substantially outweighed by its danger of unfair prejudice and confusion of the issues. Thus, pursuant to Federal Rule of Evidence 403, the court shall not allow this evidence.

I. Conclusion

For all of the reasons stated above, Government's Motion in Limine Regarding Condition of Defendant's Property Following the Search, Survey of Defendant's Property, Condition of Defendant's Property That Was Returned to Him, Marijuana Plant Yield, Elements Which Constitute Personal Use of Marijuana, Marijuana Species and the Practices for Growth and Cultivation of Marijuana for Personal and/or Commercial Use and the Condition of the Farm on 9/4/98 (Doc. 66) is granted.

VII. Defendant's Motion for Additional Time to Conduct Voir Dire (Doc. 67)

Defendant seeks additional time to conduct voir dire, mistakenly relying on the court's rules of practice and procedure in civil cases. This court does not ordinarily limit the amount of time given to attorneys in criminal

cases to conduct voir dire. For this reason, the Defendant's Motion for Additional Time to Conduct Voir Dire (Doc. 67) is denied as moot.

VIII. Defendant's Motion in Limine Regarding Character Evidence (Doc. 68)

The defendant seeks an order barring the government from introducing evidence pursuant to Rule 404(b) of the Federal Rules of Evidence. The government has responded that it does not intend to offer evidence pursuant to Rule 404(b). Thus, defendant's Motion in Limine Regarding Character Evidence is denied as moot.

IX. Defendant's Motion in Limine Regarding Any Allegations or Inferences of Drug Proceeds with Regard to Property Seized from Defendant's Residence and Bank Accounts (Doc. 69)

Defendant seeks an order barring the government from offering any evidence that items of value seized from his home pursuant to the search warrant were "a result of proceeds from drug sales." The government's response acknowledges that to the extent that the evidence shows that a defendant's wealth is explicable, it is not generally relevant. However, the government asserts that to the extent that the evidence shows a defendant's wealth is inexplicable, it is admissible.

Courts have routinely held unexplained wealth admissible. *See United States v. All Right, Title and Interest*, 983 F.2d 396, 405 (2d Cir.1993) (allowing use of unexplained wealth in conjunction with evidence of drug trafficking as proof of probable cause); *United States v.*

Antzoulatos, 962 F.2d 720, 727 (7th Cir.1992) (presence of unexplained wealth evidence admissible). Given the government's representations to the court that this evidence would only be offered to the extent that defendant's wealth is inexplicable, defendant's motion is without merit. Therefore, Defendant's Motion in Limine Regarding Any Allegations or Inferences of Drug Proceeds with Regard to Property Seized from Defendant's Residence and Bank Accounts (Doc. 69) is denied.

X. Defendant's Motion for Protective Order (Doc. 72)

Defendant seeks a protective order barring the government "from taking any action to influence the testimony of Walt Carroll through contacting his employer, and to prevent the State of Nebraska from terminating or constructively discharging Mr. Carroll because he has been subpoenaed to testify as an expert for the defense." Government's counsel has responded that he has independently confirmed that Sheriff Coggins and the Marshall County Attorney did contact Carroll and Carroll's supervisor sometime prior to the government's receipt of this motion. Both men indicated that this contact was to determine Carroll's qualifications to testify as an expert on marijuana matters. Both men indicated that Carroll's supervisor did not have knowledge of Carroll's participation in this case.

The court finds that this was an appropriate reason for government representatives to contact Mr. Carroll and his supervisor. Additionally, government counsel has represented to the court that he has directed Sheriff Coggins, SA Christy, K.B.I., and the Marshall County Attorney to

have no further contact with Carroll and his supervisor. Furthermore, this court does not have jurisdiction to order the state of Nebraska not to discharge Mr. Carroll. Therefore, Defendant's Motion for Protective Order (Doc. 72) is denied.

XI. Defendant's Motion in Limine to Exclude Testimony about Evidence Which Has Not Been Preserved and to Prohibit Any Testimony Regarding Opinions Based on Scientific, Technical, or Other Specialized Knowledge (Doc. 73)

Defendant's motion alleges that the government's formal witness list did not contain addresses, dates of birth, statements, qualifications of the witnesses, or any reports generated by the witnesses listed. His motion further alleges that the government did not state that any of its witnesses would testify as experts. Additionally, his motion alleges that for these reasons any evidence regarding "plants with peat pots" should be limited to those "plants with peat pots that were properly preserved for evidentiary purposes through videotape, photographing, or physically taken into custody."

The parties acknowledge, and the Omnibus Hearing Report shows, that this is a full discovery matter. The parties further acknowledge that full discovery has been provided to defendant. The government's witnesses authored reports, or their observations and activities were recorded in agents' reports authored by others present at the time. At the suppression hearing in this matter, the government presented the bulk of its case against this defendant. The court finds that the identities of the

government's witnesses, their business addresses and the substance of their respective testimonies has been revealed to defendant.

The court further finds that included in the government's full discovery were the reports of Jim Schieferecke, Forensic Chemist with the K.B.I. Schieferecke performed the analysis of the substances seized in this matter. Additionally, the Omnibus Hearing Report filed in this matter and signed by counsel for the parties fully disclosed the government's intent to offer expert testimony in this matter. Mr. Schieferecke is well known to this court and counsel for defendant, through his numerous testimonies on the behalf of the K.B.I. in the United States District Court for the District of Kansas and in the Kansas state courts. The court finds that Schieferecke's qualifications and proposed trial testimony has been fully disclosed to the defendant.

The court also finds that the Omnibus Hearing Report does not compel the government to disclose the dates of birth of witnesses. However, the defendant has agreed to make such a disclosure of its witnesses to the government. The clear purpose of this requirement is to ensure that criminal history checks can be done to determine whether witnesses have previously been convicted of any crime which would form the basis of impeachment questions. Counsel for the government has disclosed that the officers, agents and employees of law enforcement have no criminal history records and that the witnesses that the government intends to call in its case-in-chief do not have any criminal histories.

The court finds that the K.B.I., like most law enforcement agencies, has limited storage space for evidence seized by its agents. For this reason, in appropriate cases, only representative samples of evidence are kept when large quantities of like evidence are seized. Defendant complains that agents did not seize and/or photograph all of the peat pots that they observed on his property. Defendant alleges that they should be barred from offering any testimony regarding their respective observations at or about defendant's residence which were not reported, videotaped, photographed, or seized.

After establishing to the court's satisfaction that a witness can offer an opinion as a lay witness under Federal Rule of Evidence 701, witnesses may testify to their relevant observations, upon proper foundation, whether contained in a report or not. If an agent offers testimony not contained in a report, this may be inquired into on cross-examination to challenge the credibility of the statement. This goes to the weight of the evidence and not to its admissibility. Therefore, the court finds that the defendant is free to make this argument to the jury, but the government shall not be barred from offering this testimony.

The court finds that the agents responsible for the count, and those who personally attended the plant gathering and counting, observed the plants and peat pots and can testify to their respective observations. The court further finds that photographs and a video tape of the marijuana patch may also be admitted into evidence. *See United States v. Cody*, 7 F.3d 1523, 1527 (10th Cir.1993) (finding testimony of agent responsible for counting plants, photographs, and a videotape of the count to be

sufficient evidence of quantity). For all of the above reasons, Defendant's Motion in Limine to Exclude Testimony about Evidence Which Has Not Been Preserved and to Prohibit Any Testimony Regarding Opinions Based on Scientific, Technical, or Other Specialized Knowledge (Doc. 73) is denied.

XII. Government's Motion for Decision on the Briefs (Doc. 79)

The government seeks an order, regarding its motion in limine to exclude the defendant's proffered trial testimony of Ed Rosenthal, on the briefs without an evidentiary hearing. Defendant's response acknowledges that the court is not required to hold an evidentiary hearing on this issue, but argues that the government's reliance on the transcript from *United States v. Wyman and Hadley*, D. Kan. No. 94-40038-01/02-RDR and the opinion in *United States v. Kelley*, 6 F.Supp.2d 1168, 1179-85 (D.Kan.1998) is misplaced. Defendant asserts that these decisions are not binding on this court and that the additional information regarding Rosenthal merits an evidentiary hearing.

The court finds that while the courts' respective opinions in *United States v. Wyman and Hadley* and *United States v. Kelley*, are not binding on this court, these opinions, and the analysis contained therein, are instructive regarding Mr. Rosenthal's alleged qualifications and proffered testimony. The court further finds that, although a defendant may seek an evidentiary hearing on the government's motion in limine,

> Daubert does not mandate one. Nevertheless, an appellate court must have before it a sufficiently

> developed record in order to allow a determination of whether the district court properly applied the relevant law. The analysis outlined in Daubert is extensive, requiring the district court to 'carefully and meticulously' review the proffered scientific evidence.

United States v. Call, 129 F.3d 1402, 1405 (10th Cir.1997) (citation omitted).

The court allowed defense counsel an unlimited opportunity to proffer information regarding Rosenthal's qualifications and proposed testimony at the hearing on the government's motion in limine on November 2, 1998. Counsel for defendant, William K. Rork, has sponsored Rosenthal on at least two prior occasions in the District of Kansas: *United States v. Wyman and Hadley*, D. Kan. No. 94-40038-01/02-RDR and *United States v. Kelley and McCormick*, D. Kan. No. 97-40024-01/02-SAC. Thus, Mr. Rork is intimately familiar with Rosenthal's qualifications and proposed testimony. At the hearing on the government's motion in limine to exclude Rosenthal's proffered testimony, Mr. Rork provided the court, orally and in documentary form, every reason known to defendant to allow Rosenthal's proffered testimony in this trial.

In considering this motion, the court has fully reviewed and considered the transcripts of Rosenthal's testimony from *United States v. Wyman and Hadley*, D. Kan. No. 94-40038-01/02-RDR; the motions, pleadings and evidence submitted regarding the government's motion in limine, and defendant's responses thereto, regarding Rosenthal in *United States v. Kelley and McCormick*, D. Kan. No. 97-40024-01/02-SAC; the evidence submitted with the government's motion in limine in this

case; the evidence submitted by the defendant in his responses to the government's motion in this case; and the evidence and arguments submitted by the parties at the hearing on this motion on November 2, 1998. Based on a review of all of the above material, the court finds that it has been provided with sufficient evidence to decide this motion. The alleged changes in Rosenthal's credentials have been provided to the court. Additionally, the court finds that defendant's proffered testimony from Rosenthal is essentially the same as his prior testimony in the matter of *United States v. Wyman and Hadley*. Therefore, the Government's Motion for Decision on the Briefs (Doc. 79) is granted.

XIII. Government's Motion in Limine Regarding William Logan and Walt Carroll and for Decision on the Briefs (Doc. 80)

The government seeks an order barring the proffered trial testimonies of William Logan and Walt Carroll, based upon the information provided to the government during reciprocal discovery. At the hearing on this motion, neither Logan nor Carroll appeared to testify for the defendant. The defendant submitted a resume from Carroll with attachments that show he has attended several law enforcement related schools and an affidavit that evidences what his proffered testimony would be. The defendant has also submitted Logan's resume and an affidavit indicating his unavailability to testify at the hearing on the pretrial motions.

The defendant bears the burden of laying a foundation for the expert testimony. *Williams*, 95 F.3d at 729.

" 'Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony.' " *United States v. Diallo*, 40 F.3d 32, 34 (2d Cir.1994) (quoting *United States v. Lewis*, 954 F.2d 1386, 1390 (7th Cir.1992)).

The court finds that Carroll's credentials evidence no training, experience or schooling in matters specifically related to marijuana identification, marijuana eradication, marijuana processing, marijuana use, and marijuana processing. In addition, the court finds that the information supplied by defendant regarding Logan fails to meet the standards discussed above regarding the admissibility of his proffered expert testimony. Based upon the information provided to the court in defendant's response and at the hearing on this motion, the court finds that defendant has failed to meet the burden of laying the foundation for this expert testimony. The court finds that the purported testimonies of Logan and Carroll extend beyond their respective demonstrated areas of specialized knowledge.

As noted with regard to Rosenthal, the information provided to the court by defendant tells the court nothing about the scientific reliability of the opinions proffered by Logan and Carroll. There is no evidence that either man's writings on marijuana have been recognized as a valid research effort or reference book in the field of botany. There is nothing of record that would lead this court to believe that it should rely on Mr. Logan's former clients, members of the California criminal defense bar, California marijuana users or the readers of his articles as a valid indicator of reliability. Nor is there anything of record that would lead this court to believe that it should

rely on Mr. Carroll's perusal of defendant's property after officers and agents had seized the evidence that will be admitted in this trial and of the general area wherein wild marijuana plants grew as evidence of the yield of the plants seized. Additionally, Mr. Carroll's resume shows very limited, if any, training and experience in marijuana eradication and cultivation. This tells the court that Mr. Carroll's proffered testimony is not scientifically reliable.

The court finds that an evidentiary hearing is not necessary to resolve the government's motion in limine. The court has before it a sufficiently developed record in order to allow the court to properly apply the relevant law. The court has carefully and meticulously reviewed the substantial proffer of evidence submitted by defendant in support of both Mr. Carroll and Mr. Logan. Defendant has presented the areas about which each witness would testify and all of the evidence available regarding each alleged expert. Defendant does not allege that additional relevant evidence exists regarding either man.

For all of the reasons stated above, Government's Motion in Limine Regarding William Logan and Walt Carroll and for Decision on the Briefs (Doc. 80) is granted.

XIV. Defendant's motion for sanctions (Doc. 90)

Defendant's motion alleges that, in December of 1997, defense counsel visited the Kansas Bureau of Investigation laboratory in Topeka to examine all of the evidence. He alleges that at that time, counsel "were not

shown 100 marijuana plants with root systems" or evidence of "peat pots and their origin." The motion states that on October 29, 1998, government's counsel informed defense counsel that he had observed over 100 plants with root systems attached at the K.B.I. laboratory. Defendant seeks sanctions against the government for failure to disclose material evidence.

Defense counsel admits that government's counsel was unaware of this alleged mix-up, and that the government's counsel has offered to make the marijuana plants available for their perusal on Monday, November 2, 1998. The court further notes that in the government's response to defendant's pretrial motions, government's counsel has again offered to make available all of the reports and evidence in this case at any mutually convenient time prior to trial. The government's response to this motion indicates that this offer remains open. Counsel for the government reiterated this at the hearing on this motion.

The court finds that, based upon the representations of counsel, it appears to the court that what has occurred is a simple misunderstanding. The court further finds that the government's standing offer to allow defense counsel to examine all of the reports and evidence in this case at any mutually convenient time prior to trial is curative of the matters alleged by defendant. Therefore, Defendant's Motion for Sanctions (Doc. 90) is denied.

IT IS THEREFORE BY THE COURT ORDERED that Government's Motion in Limine Regarding Psychiatric and/or Psychological Testimony (Doc. 59); Government's Motion in Limine Regarding Defendant's Medical Condition (Doc. 60); Government's Motion in Limine Regarding

Defendant's Videotape (Doc. 61); Government's Motion in Limine Regarding Rehash of Suppression Hearing Evidence Regarding Legal Matters Before the Jury (Doc. 64); Government's Motion in Limine to Exclude Proffered Testimony of Ed Rosenthal (Doc. 65); Government's Motion in Limine Regarding Condition of Defendant's Property Following the Search, Survey of Defendant's Property, Condition of Defendant's Property That Was Returned to Him, Marijuana Plant Yield, Elements Which Constitute Personal Use of Marijuana, Marijuana Species and the Practices for Growth and Cultivation of Marijuana for Personal and/or Commercial Use and the Condition of the Farm on 9/4/98 (Doc. 66); Government's Motion for Decision on the Briefs (Doc. 79); and Government's Motion in Limine Regarding William Logan and Walt Carroll and for Decision on the Briefs (Doc. 80) are granted.

IT IS FURTHER ORDERED that Defendant's Motion in Limine Regarding Any Allegations or Inferences of Drug Proceeds with Regard to Property Seized from Defendant's Residence and Bank Accounts (Doc. 69); Defendant's Motion for Protective Order (Doc. 72); Defendant's Motion in Limine to Exclude Testimony about Evidence Which Has Not Been Preserved and to Prohibit Any Testimony Regarding Opinions Based on Scientific, Technical, or Other Specialized Knowledge (Doc. 73); and Defendant's Motion for Sanctions (Doc. 90) are denied.

IT IS FURTHER ORDERED that Defendant's Motion for Additional Time to Conduct Voir Dire (Doc. 67) and Defendant's Motion in Limine Regarding Character Evidence of the Defendant (Doc. 68) are denied as moot.

APPENDIX C

United States District Court, D. Kansas.
UNITED STATES OF AMERICA,
Plaintiff,

v.

Mark Henry ALLERHEILIGEN,
Defendant.

No. 97-40090-01-DES.

June 8, 1998.

Robert L. Pottroff, Myers, Pottroff & Ball, Manhattan, KS, for Mark Henry Allerheiligen, defendant.

MEMORANDUM AND ORDER

SAFFELS, Senior J.

NOW on this 8th day of June, 1998, this memorandum and order is entered to memorialize the court's ruling on the defendant's motion to suppress evidence during the June 1, 1998, hearing. The court, after reviewing the motion and being fully advised in the premises, finds as follows:

1. That on November 19, 1997, the grand jury returned a one count Indictment in this matter. Count One alleges that on or about September 3, 1997, defendant possessed with intent to distribute or dispense approximately 1346 marijuana plants regardless of weight, a Schedule I controlled substance, in violation of 21 U.S.C. § 841(a)(1).

2. That defendant's motion seeks an order suppressing evidence seized as a result of law enforcement's search of his residence, outbuildings and premises on

September 3, 1997. He alleges that law enforcement officers twice entered his property unlawfully, once by aircraft and the second time by walking onto his property; that the affidavit in support of the subsequent search warrant contains false and/or misleading information and that the facts contained therein are insufficient to support a finding of probable cause; and that the search warrant is invalid.

3. That Special Agent [SA] David Christy, Kansas Bureau of Investigation [KBI], testified at the hearing in this matter. The court finds that SA Christy is a credible witness with no reason to fabricate.

4. That SA Christy has been flying fixed-wing aircraft since 1968. He is a licensed pilot and familiar with the rules and regulations necessary to obtain such licensing. Since 1983, SA Christy has flown aerial surveillance in search of marijuana plants in the state of Kansas and other states. In over 300 separate occasions, SA Christy has observed what he believed to be both cultivated and wild marijuana, as well as growing or cultivating paraphernalia. SA Christy has observed these items from the ground, fixed-wing aircraft, and helicopters. SA Christy has received two separate courses of classroom training dealing in part with aerial identification of marijuana plants in addition to his fourteen years of actual flight identification. SA Christy, based on his training and experience, is able to identify marijuana plants in cultivation and paraphernalia from the air while flying an aircraft.

5. That during the morning of August 27, 1997, SA Christy, SA Larry Dixon of the Kansas Bureau of Investigation and Marshall County Sheriff Kenneth Coggins, at

Sheriff Coggins' request, were flying in a fixed-wing aircraft piloted by SA Christy, flying at an altitude of approximately 1,000 feet above the ground over Marshall County, Kansas. At that time, SA Christy spotted what he believed to be several hundred cultivated marijuana plants in a clearing in the trees, located behind the Allerheiligen residence. This area is located approximately five miles west of Lone Elm, Kansas, in the southeast corner of section 16 in Marshall County, Kansas. At this location, SA Christy could also observe a two story white house, four white out buildings, and one reddish out building. At that time, SA Christy, from the fixed-wing aircraft, using a Cannon T-50 camera, 35 to 85 mm lens, photographed the clearing which contained marijuana plants and a pathway coming from the plants, southbound back to a fence which contained a gate at the back of the barn. SA Christy also photographed the residence and out buildings contained on this property.

6. That on August 29, 1997, at approximately 7 a.m., using the open field doctrine, SA Dixon, SA Sabel, and Marshall County Sheriff Coggins, walked into the marijuana field. At that time, they observed numerous marijuana plants broken off 10"-12" above the ground. The agents observed one plant which had been pulled and had a grow cup (pot cup) still attached to the root of the system. They also observed a fairly new (Bit-O-Honey) candy wrapper that was found in the patch and observed a foot trail leaving the south end of the marijuana patch, leading south to a gate. They also observed that the cultivated marijuana patch is in a fenced-off area. SA Christy believed the plants to be growing, cultivated marijuana for the following reasons: the color of the

plants observed were similar to the color of plants previously observed and seized; the height, the shape and dissimilar shade of green of these plants is consistent with SA Christy's previous observations of growing cultivated marijuana and are inconsistent with any of the other vegetation observed in the area; and the plants and paraphernalia were located in an area which was not visible from the county roadway and had a distance that would make normal gardening very laborious. It is SA Christy's experience that this is common in marijuana fields to avoid detection and to also avoid the searching of personal residences for evidence. These marijuana plants are normally placed in areas, which are not visible from public roads. Usually, the only method of surveillance would be from an aircraft during the day. SA Christy stated that he did not observe any wild marijuana from the aircraft at that location this day.

7. That in his affidavit to obtain search warrant, SA Christy included all of the above information and attached three of the photographs that he took from the fixed-wing aircraft on August 27, 1997.

8. That the legal description contained in the affidavit in support of the search warrant in question and the search warrant itself described with particularity the property to be searched and the items to be seized.

> The Fourth Amendment's particularity requirement "ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause." We apply a practical test to this requirement, however, and have held that a warrant's description of things to be seized is

> sufficiently particular if it allows the searcher to "reasonably ascertain and identify the things authorized to be seized."

United States v. Finnigin, 113 F.3d 1182, 1186-87 (10th Cir.1997) (citations omitted).

> The Fourth Amendment provides that "no warrants shall issue . . . without particularly describing the place to be searched. . . . " The Supreme Court has noted that the Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched. . . . " The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas . . . , the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.
>
> As we have previously stated, a " 'description is sufficient if [it] enables the officers to ascertain the place to be searched' with reasonable effort." Applying this standard, we have held that a partially erroneous description was not fatal where officers nonetheless were able, with reasonable effort, to ascertain the area to be searched. Likewise, we have ruled that a warrant authorizing the search of a certain premises that is otherwise adequately described permits officers to search vehicles located on the curtilage when the objects of the search might be located in those vehicles, even though the warrant does not specifically authorize the search of vehicles.

United States v. Dahlman, 13 F.3d 1391, 1394-95 (10th Cir.1993), cert. denied, 511 U.S. 1045, 114 S.Ct. 1575, 128 L.Ed.2d 218 (1994) (citations omitted). The affidavit, which was properly attached to the warrant, in this case described the place to be searched and the items to be seized as:

> The legal description of this property is as follows: 390 Cherokee Road, Bremen, Kansas, a white two story rural residence with several out buildings located in Township 1-S, R 6/E, Section 16, Marshall County, Kansas. This residence would be located in the southeast one-fourth of that section. The person residing at this address is Mark Allerheiligen.
>
> The areas to be searched are: temporary premises found in or near the marijuana field where certain articles, items and property, which are being used as a means of committing a drug offense or in the possession of one to whom it was delivered for the purpose of concealing or preventing its being discovered, or which constitutes evidence which tends to show that a felony has been committed, and that the said articles of property are particularly described as follows.
>
> Marijuana in all forms, paraphernalia commonly associated with storage, the cultivation and the use of marijuana, consisting in part of and including, but not limited to, pipes, sifters, baggies, scales, cultivation equipment, including, but not limited to, hoses, pumps, timers, hand tools, fertilizer and wire, and articles of property tending to establish the identity of persons in control of the marijuana field, premises, vehicles, storage areas or containers consisting

> in part of and including, but not limited to, utility company receipts, rent receipts, rental equipment receipts, addressed envelopes, and receipts for irrigation equipment, fertilizers and other items used in the cultivation of marijuana.
>
> The search is to include the residence, all out buildings, vehicles, caves, tents, lean-tos or sheds that any foot trails leading to/or from the marijuana field, as well as waterlines to their sources.

The court finds that under the facts of this case, the warrant was sufficiently particular to properly "allow the executing officers to distinguish between items that may and may not be seized." *Finnigin*, 113 F.3d at 1187 (citing *United States v. Leary*, 846 F.2d 592, 602 (10th Cir.1988)).

This warrant incorporated the affidavit by reference with regard to items which were to be seized. The description of the places to be searched were sufficiently particularized to enable "the officers to ascertain the place to be searched with reasonable effort." *United States v. Sturmoski*, 971 F.2d 452, 458 (10th Cir.1992). For these reasons, defendant's argument that the warrant lacked specificity as to the place to be searched and the items to be seized is overruled and denied.

9. That the initial fly-over of defendant's property did not violate defendant's airspace. The Supreme Court's decision in *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986), controls this case. Although *Ciraolo* involved the aerial observation of curtilage from an altitude of 1,000 feet, *see* 476 U.S. at 209, the Supreme Court has approved of aerial surveillance at lower altitudes. *See Florida v. Riley*, 488 U.S. 445, 451-52,

109 S.Ct. 693, 102 L.Ed.2d 835 (1989) (plurality opinion) (helicopter surveillance of partially covered greenhouse at 400 feet); *id.* at 451 n. 3 ("Federal Aviation Administration regulations permit fixed-wing aircraft to be operated at an altitude of 1,000 feet while flying over congested areas and at an altitude of 500 feet above the surface in other than congested areas. . . . "); *id.* at 452-55 (O'Connor, J., concurring in the judgment) (arguing the plurality overemphasizes compliance with FAA regulations; proper inquiry is whether defendant had a reasonable expectation of privacy from aerial observation, based in part on regularity with which members of the public travel at that altitude). The evidence clearly shows that this was other than a congested area.

10. That the property surveyed was not within the curtilage of Allerheiligen's home. Defendant no doubt intended and expected that his marijuana garden would not be open to public inspection, and the precautions he took protected against ground-level observation. However, because the marijuana garden which was the subject of the motion to suppress was in an open field, what was growing in this marijuana garden was subject to view from the air. Under the holding in *Ciraolo*, defendant could not reasonably have expected the contents of his marijuana garden to be immune from examination by an officer seated in a fixed-wing aircraft flying in navigable airspace at an altitude of 1,000 feet. Here, the inspection was made from a fixed-wing plane. "[P]rivate and commercial flight in the public airways is routine" in this country, *Ciraolo*, 476 U.S., at 215, and there is no indication that such flights are a rarity in Marshall County, Kansas. Defendant could not reasonably have expected

that his marijuana garden was protected from public or official observation from an airplane had it been flying within the navigable airspace for fixed-wing aircraft. *See Riley*, 488 U.S. at 450-451. Additionally, ". . . Federal Aviation Administration regulations permit fixed-wing-aircraft to be operated at an altitude of 1,000 feet while flying over congested areas and at an altitude of 500 feet above the surface in other than congested areas . . . 14 CFR § 91.79 (1988)." *Id.* at 451, n. 3. This was a rural, uncongested area. "As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury. In these circumstances, there was no violation of the Fourth Amendment." *Id.* at 452. SA Christy's testimony that his altimeter was operating properly and that he was flying at a height of 1,000 to 2,000 feet is credible and adopted by the court.

11. That the use of an aerial camera for an inspection does not change this privacy conclusion. *See Dow Chemical Co. v. United States*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986). Although magnification could reveal a number of things not visible to the naked eye, "the photographs here are not so revealing of intimate details as to raise constitutional concerns." 476 U.S. at 238. Thus, SA Christy's use of the camera here was not inappropriate or unconstitutional.

12. That the subsequent "walk-in" onto defendant's property was not a violation of his constitutional rights. As SA Christy's affidavit and subsequent hearing testimony indicates, "[o]n August 29, 1997, at approximately 7:00 a.m., using the open field doctrine, SA Dixon, SA Sabel, and Marshall County Sheriff Coggins, walked into

the marijuana field." "It is well-established that government activity is not a search unless it intrudes upon an individual's justified expectation of privacy." *United States v. Hutchings*, 127 F.3d 1255, 1259 (10th Cir.1997) (citing *Katz v. United States*, 389 U.S. 347, 352-53, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). The large field was a substantial distance, approximately 150 yards, from defendant's residence in an open field area. Agents gained access to the area from a north-south road that runs on the east side of defendant's property. They crossed over a barbed wired fence, through a pasture, and through a creek to the field to the wooded area where the plants were located at the edge of a pasture near timber. "[T]he plants were growing in an open field; open fields receive Fourth Amendment protection only in rare circumstances not relevant here." *Id.* (citing *United States v. Dunn*, 480 U.S. 294, 302-05, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987)); *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924). *See also United States v. Knapp*, 1 F.3d 1026, 1029 (10th Cir.1993).

13. That the *Dunn* factors indicate the defendant did not have a reasonable expectation of privacy for this area. The agents made their observations from other than close proximity to the house. The field that the agents walked into was an open field which, as mentioned above, was far from the residence. There is no indication in the record that defendant attempted to shield the marijuana field from public view, nor is there any evidence that defendant had any particular use for this area. *See Knapp*, 1 F.3d at 1029. Additionally, this area was not a part of defendant's yard. This field "was not so intimately tied to

the . . . house that it enjoyed Fourth Amendment protection." *Id.* (citing *United States v. Swepston*, 987 F.2d 1510, 1513-15 (10th Cir.1993)).

14. That the court rejects defendant's argument that the search warrant application and affidavit was insufficient to establish probable cause and/or contained false information, unsubstantiated opinions of SA Christy, irrelevant and immaterial statements of SA Christy, and omissions of known facts. "Probable cause exists where the facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information are sufficient to warrant a prudent man in believing that an offense has been or is being committed." *Karr v. Smith*, 774 F.2d 1029, 1031 (10th Cir.1985). The affidavit submitted in support of the search warrant in this matter sets out sufficient facts for a neutral and detached magistrate to determine that probable cause existed to support the search of the residence.

15. That "[t]he existence of probable cause is a common sense standard." *United States v. Janus Indus.*, 48 F.3d 1548, 1552 (10th Cir.1995), cert. denied, 516 U.S. 824, 116 S.Ct. 87, 133 L.Ed.2d 44 (1995). The court must "give great deference to the magistrate's determination of probable cause, and [it] should uphold that conclusion if the 'totality of the information contained in the affidavit provided a substantial basis for finding there was a fair probability that evidence of criminal activity would be found.' " *Id.* at 1553 (quoting *United States v. Hager*, 969 F.2d 883, 887 (10th Cir.1992), cert. denied, 506 U.S. 964, 113 S.Ct. 437, 121 L.Ed.2d 357 (1992)); *United States v. Finnigin*, 113 F.3d 1182, 1185 (10th Cir.1997). See also *United States v. Glover*,

104 F.3d 1570, 1577-78 (10th Cir.1997). This affidavit contains sufficient information obtained from observations the law enforcement officials made on the scene and in the air to "ensure that the magistrate issuing the warrant had a 'substantial basis' for concluding that probable cause existed." *Finnigin*, 113 F.3d at 1186. Applying these principles, the totality of the evidence contained in this affidavit substantially supports the conclusion that there was "a fair probability that contraband" would be found in the residence. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The court must review the affidavit as a whole. *Glover*, 104 F.3d at 1578. Having done so, the court concludes that the information in this affidavit provided substantial grounds for believing that contraband could be found in the defendant's residence. *Id.* Accordingly, the search of the defendant's residence pursuant to the search warrants did not violate the Fourth Amendment.

16. That the court rejects defendant's argument that the affidavit contains incomplete information and false information. There is no evidence that SA Christy falsified any information contained in this affidavit. Furthermore, there is no evidence that SA Christy knowingly omitted information relevant to the magistrate's decision that probable cause existed for the issuance of the warrant. Information used to support the issuance of a warrant does not have to provide for certainty that the sought objects will be found; rather, the facts and circumstances taken as a whole should provide probable cause to believe that the sought items will be found in the search. *United States v. Brinklow*, 560 F.2d 1003, 1006 (10th

Cir.1977), cert. denied, 434 U.S. 1047, 98 S.Ct. 893, 54 L.Ed.2d 798 (1978). As the Supreme Court has stated:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Defendant's allegations that the search warrant affidavit omitted information and contained incomplete information are overruled and denied.

17. That the court further finds that the information contained in the affidavit for the search warrant is sufficient to establish probable cause, even assuming the truth of defendant's allegations. *See United States v. Myers*, 106 F.3d 936, 940 (10th Cir.1997), cert. denied 520 U.S. 1270, 117 S.Ct. 2446, 138 L.Ed.2d 205 (1997) (citing *Franks v. Delaware*, 438 U.S. 154, 156, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) (even if a court finds that some information is false, suppression is required only if the false or misleading information is necessary to a finding of probable cause)); *United States v. Knapp*, 1 F.3d 1026, 1029 (10th Cir.1993) (a knowing or reckless omission from a warrant application violates the Fourth Amendment only if the omitted material would vitiate probable cause). The alleged falsehoods are not fatal to the determination of probable cause. Thus, defendant's challenges that the search warrant for his residence omitted information and

contained incomplete information are also overruled and denied.

18. Finally, in *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court announced an exception to the exclusionary rule, providing that evidence seized under a warrant later found to be invalid may be admissible if the executing officers acted in good faith and with reasonable reliance on the warrant.

> As the Supreme Court stated in Leon, "the suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." Moreover, it is clear that an "officer's reliance on the magistrate's . . . determination . . . on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing the warrant was properly issued."
>
> In determining whether the Leon exception should be applied, the "good faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known the search was illegal despite the magistrate's authorization." . . . To answer this "objectively ascertainable question," we are to consider "all of the circumstances," and assume that the executing "officers have a reasonable knowledge of what the law prohibits."

Dahlman, 13 F.3d at 1397 (citations omitted).

Upon consideration of all of the evidence produced at the bearing [sic] in this matter, examining the warrant and attached affidavit, and assuming that the executing officers had a reasonable knowledge of what the law prohibits, the court finds that no reasonably well trained officer would have known the search was illegal despite the magistrate's authorization. The officers had no reasonable grounds for believing the warrant was not properly issued. Thus, considering all of defendant's challenges to this search warrant, his motion to suppress is overruled and denied.

IT IS THEREFORE ORDERED that the defendant's motion to suppress is overruled and denied.

IT IS FURTHER ORDERED that trial in this matter shall commence at 10 a.m. on Monday, June 29, 1998.

APPENDIX D

United States District Court,
D. Kansas.

UNITED STATES of America,
Plaintiff,

v.

Mark Henry ALLERHEILIGEN,
Defendant.
No. 97-40090-01-DES.

May 6, 1999.

Gregory G. Hough, Office of United States Attorney, Topeka, KS, for United States, plaintiff.

Robert L. Pottroff, Valerie L. Peterson, Myers, Pottroff & Ball, Manhattan, KS, William K. Rork, Rork Law Office, Topeka, KS, for Mark Henry Allerheiligen, defendant.

MEMORANDUM AND ORDER

SAFFELS, District Judge.

This matter is before the court on the defendant's Motion to Reconsider Rulings Made in Chambers with Regard to Sentencing Issues (Doc. 117).

I. BACKGROUND

The defendant pled guilty to one count of possession with intent to distribute marijuana on November 3, 1998.[1]

---

[1] Although defendant now characterizes this as a conditional plea of no contest, the record clearly indicates that defendant entered a guilty plea, rather than a plea of no contest.

Defendant was sentenced to a period of incarceration of 41 months pursuant to the safety valve provisions of the sentencing guidelines, U.S.S.G. § 5C1.2 and 18 U.S.C. § 3553(f), on April 12, 1999. Defendant filed his notice of appeal on April 26, 1999, at the same time that he filed the motion which is currently before the court.

II. DISCUSSION

A. Jurisdiction

The government asserts in its supplemental response to the defendant's motions that the court lacks jurisdiction to decide the motion to reconsider, arguing that the filing of the notice of appeal divests the court of jurisdiction.

The court recognizes that the general rule regarding the district court's jurisdiction is that " '[t]he filing of a notice of appeal . . . transfers jurisdiction over the matter from the district court to the court of appeals.' " *United States v. Pinter*, 971 F.2d 554, 557 (10th Cir.1992) (quoting *United States v. Winterhalder*, 724 F.2d 109, 111 (10th Cir.1983)). However, a review of the case law indicates that the notice of appeal does not divest the district court of jurisdiction when it is filed after a motion to reconsider. *See United States v. Jackson*, 950 F.2d 633, 634 (10th Cir.1991) (motion to reconsider filed three days before notice of appeal); *United States v. Haddock*, 956 F.2d 1534, 1544 (10th Cir.1992), overruled on other grounds by *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) ("district court had jurisdiction to address the claim because it was raised before defendant filed a notice of appeal to this court"); *United States v.*

Strahl, 958 F.2d 980, 982 (10th Cir.1992) (district court ruled on motion for reconsideration filed five days before notice of appeal); but cf. *United States v. Salzano*, 994 F.Supp. 1321 (D.Kan.1998) (no jurisdiction where defendant filed motion to reconsider twelve days after filing notice of appeal).

Furthermore, the United States Supreme Court has recognized that the filing of a timely motion to reconsider in a criminal case "renders an otherwise final decision of a district court not final" until the motion is decided, just as a motion for rehearing would. *United States v. Ibarra*, 502 U.S. 1, 6, 112 S.Ct. 4, 116 L.Ed.2d 1 (1991). Thus, the time period in which a notice of appeal must be filed does not begin to run until the district court has decided the motion to reconsider. *Id.* at 6-7, 112 S.Ct. 4. In addition, the Tenth Circuit has held that a notice of appeal filed after a timely motion to reconsider must be held in abeyance until the district court decides the motion to reconsider. *United States v. Jackson*, 950 F.2d 633, 635 (10th Cir.1991). This allows "the district court to consider claims of error so that [the court of appeals] may review a criminal judgment which is final in the practical sense." *United States v. Varah*, 952 F.2d 1181, 1183 (10th Cir.1991). Thus, logically, the district court must have jurisdiction to decide a timely filed motion to reconsider which precedes the filing of a notice of appeal.

In this case, the notice of appeal was filed at precisely the same time as the motion to reconsider. As a result, the court is unable to determine which was filed first, although the court notes that the motion to reconsider was docketed before the notice of appeal. Therefore, the court finds that, in the interest of judicial economy, the

court should exercise jurisdiction and decide the defendant's motion to reconsider on the merits.

B. Motion to Reconsider Rulings Made in Chambers with Regard to Sentencing Issues (Doc. 117)

The defendant requests that the court reconsider its ruling in chambers that the defendant would not be eligible for the application of the safety valve if he contested the number of plants at sentencing. In support of this, defendant asserts that the government and the Probation Office have taken the position that the defendant "adopted" wild marijuana and that plants planted by defendant in previous years and dead plants should also be attributed to the defendant. Defendant asserts that he is not attempting to deny relevant conduct. Instead, defendant claims that he is merely contesting how the plants were counted and which plants are to be included for sentencing purposes.

The government responds that counsel for the government does not recall any rulings being made in chambers, and, therefore, the court should summarily deny the motion because there is nothing to reconsider. In addition, the government asserts that defendant is essentially appealing the court's ruling by asking for reconsideration; therefore, the defendant would bear the burden of creating an adequate record. In the alternative, the government responds that it would not oppose re-sentencing the defendant and allowing him to present whatever arguments he now wishes to present. However, the government would also seek an order from the court determining whether the defendant is now denying his involvement and whether the defendant has given conflicting statements as to his

involvement in the offense. The government points out that its obligations under the plea agreement are contingent upon the defendant's continuing manifestation of acceptance of responsibility and that, if the defendant should deny his involvement or give conflicting statements, then the government would not be bound by the terms of the plea agreement.

The court finds that defendant's motion to reconsider should be denied. The conversation in chambers prior to sentencing was held primarily for the defendant's benefit. The court made no rulings in chambers, but merely indicated to counsel for both sides that the court was inclined to apply the safety valve provision to this case. The court further indicated to counsel that the court did not believe defendant would be eligible for the safety valve provision if defendant continued to argue his objections with regard to the number of marijuana plants because he would no longer meet the fifth requirement for application of the safety valve by truthfully providing to the government all information and evidence the defendant has concerning the offense. *See* U.S.S.G. § 5C1.2 and 18 U.S.C. § 3553(f). This belief was based not only upon the court's review of the KBI videotape of the counting of the marijuana plants, but also on the court's review of the statements provided by the defendant prior to sentencing.[2] Since there were no rulings made in chambers, there is nothing for the court to reconsider.

---

[2] However, the court notes that the statements submitted by the defendant, in which he admitted providing the same care to the wild marijuana plants as he did to the marijuana that he planted, differ from what is now being argued in his motion to reconsider.

In addition, counsel for the defendant did not request that the conversation in chambers be placed on the record, nor did counsel attempt to make any sort of record once court was in session for the sentencing hearing. Upon review of the transcript of the sentencing hearing, the court finds that defense counsel never argued to the court that defendant should be allowed to contest the number of plants and still be eligible for the safety valve. Defense counsel also did not voice any objection, either in chambers or during the sentencing hearing, with respect to the court's view of the applicability of the safety valve. Therefore, the defendant did not make any kind of a record regarding the applicability of the safety valve if he contested the number of plants. If defendant believed that he should be allowed to contest the number of plants and still remain eligible for the safety valve, then he should have raised that argument with court so that it could be addressed on the record.

IT IS THEREFORE BY THE COURT ORDERED that defendant's Motion to Reconsider Rulings Made in Chambers with Regard to Sentencing Issues (Doc. 117) is denied.

APPENDIX E

Statement of facts from defendants brief before the Tenth Circuit Court of Appeals.

* * *

STATEMENT OF FACTS

On August 27, 1997, Special Agent David Christy of the Kansas Bureau of Investigation ("KBI") flew over the farm property of the appellant, Mark Allerheiligen to make an aerial observation of the farm. App. Vol. I at 43. Christy flew over the property twice that day, which is located in a rural area in Bremen, Marshall County, Kansas. The first fly-over took place in the morning, and the second fly-over was approximately two or three hours later. Special Agent Larry Dixon of the KBI and Marshall County Sheriff Kenneth Coggins were also present in the plane during the two fly-overs. App. Vol. I at 43.

It was well known to Sheriff Coggins and everyone who lived in the area that wild marijuana grew all along the creeks and fields around the Allerheiligen farm. See Vol. IV at 100, 103-104, 107. Allerheiligen had previously discussed the wild marijuana with Coggins, and had obtained permission to use herbicides on this vegetation before the search and seizure. App. Vol. IV at 63.

Christy, who was piloting the airplane, testified that he was flying between 1000 feet and 2000 feet during the fly-overs. App. Vol. IV at 18-20. From those altitudes, he observed what he believed to be approximately 200 cultivated marijuana plants growing behind or north of the Allerheiligen property. App. Vol. IV at 11. He claimed that he did not see any wild marijuana growing on the

property that day. *Id.* At the hearing on the motion to suppress, Christy testified that he was flying at between 1,000 and 2,000 feet when he made those observations, and that two pictures which were attached to his sworn affidavit were taken at 2,000 feet. App. Vol. IV at 20. Christy further stated that he relied exclusively on the altimeter in the aircraft to determine the height at which he was flying. There was no evidence that the altimeter had ever been certified or tested for reliability or accuracy. App. Vol. IV at 24.

With this information, Christy prepared a search warrant affidavit and attached three pictures he had taken from the air. App. Vol. IV at 12.

Christy's affidavit expressed his opinion that the marijuana plants he viewed were cultivated. In support of this belief, he states that the color of the plants showed that they were cultivated. Second, Christy states that the plants were located in "an area which was not visible from the county roadway and had a distance which would make normal gardening very laborious. It has been SA Christy's experience that this is common in marijuana fields to avoid detection and to also avoid the searching of personal residences for evidence." The third reason given was that the height, shape and dissimilar shade of green was consistent with his previous observations of growing cultivated marijuana, and was inconsistent with any other vegetation observed in that area. Christy Affidavit, App. Vol. I at 44.

In his testimony at the suppression hearing, Christy stated that he believed the marijuana was cultivated because it had "round tops rather than pointed" tops, and

admitted that he did not participate in the walk through of the field which supplied the other information contained in the affidavit. App. Vol. IV at 11.

Christy's affidavit states that no wild marijuana was observed from the aircraft the day of the fly-over. Christy further supports his cultivated marijuana belief based on observations of officers who entered the Allerheiligen property two days after the fly-over to look at the plants Christy had spotted from the air. He states in his affidavit that the officers who participated in the August 29 walk-in observed numerous marijuana plants which were broken off 10"-12" above the ground, and that one plant had been pulled and had a grow up attached to its root. Finally, Christy states that the officers also observed a "fairly new" Bit O'Honey candy wrapper in the patch, and they observed a "foot trail" leaving the south end of the marijuana patch, leading south to a gate. App. Vol. I at 43-44. Upon this basis, Christy's affidavit sought issuance of a search warrant, which was issued on September 2, 1997.

The following day, the appellant was arrested. Approximately a month later, a grand jury returned a one count indictment charging the defendant with Possession with Intent to Distribute 1346 Marijuana Plants. App. Vol. I at 1.

Allerheiligen filed a Motion to Suppress evidence prior to trial, challenging the fly-overs and subsequent walk-in as unconstitutional; alleging that the Christy affidavit was insufficient to support the issuance of a search warrant; that the content and scope of the search warrant

was defective; and that the search warrant affidavit contained false and misleading information. App. Vol. I at 14. During the hearing on this Motion, several witnesses testified for the appellant. Joyce Dixon and George Stout testified to the presence of wild marijuana on the Allerheiligen property following the search. App. Vol. IV at 99, 103. Stout further testified that in 1996 wild marijuana was growing in the same area where officers seized it in 1997. In 1996, he kept cattle in the same pasture from where the marijuana was seized in 1997. App. Vol. V at 103.

Dr. Jerry Cusick testified about the height at which the search warrant pictures were taken. Dr. Cusick has a Ph.D. from Purdue University in technology and education, and gained expertise in using photogrammetry while working with individuals who designed the space shuttle, Challenger. He was on the investigative team following the Challenger space shuttle accident. Using photogrammetry, Dr. Cusick was able to determine that one picture was taken at the altitude of 230 feet. App. Vol. IV at 124. Dr. Cusick further determined that two of the photographs submitted for application of the search warrant were taken at an altitude of 362 feet (App. Vol. IV at 133) and 360 feet (App. Vol. IV at 135).

Steve Boyda, attorney for appellant's wife, Dawn Allerheiligen, also testified at the suppression hearing. Mr. Boyda personally inspected the Allerheiligen property days after the search and found wild marijuana growing throughout the property. App. Vol. IV at 155-156. He also examined the trail observed by law enforcement officers during their flight and subsequent walk-in, and determined that it was a cattle path leading to a steel gate

connected to a corral where cattle were kept. App. Vol. IV at 151-152. He observed no evidence of human use of that trial [sic]. Mr. Boyda, along with Dr. Cusick, also flew over surrounding property at heights of 500, 1000 and 2000 feet and took pictures with a 35 mm camera to illustrate what pictures at that height would show. *See* App. Vol. VII at 10-11, App. Vol. IV at 153. The district judge denied Allerheiligen's suppression motion in his June 8, 1998 Order. App. Vol. I at 206. The matter was set for a jury trial.

Subsequently, numerous pretrial motions were filed by the Government seeking to exclude defense evidence. Allerheiligen also filed several motions, and a hearing on all these pretrial motions was held November 2, 1998. In rulings from the bench, all of the defense motions were denied, and every motion filed by the government was granted. No reason was given for any ruling. *See* App. Vol. V at 89-90. When questioned, the court did give some minimal rationale for his decision to exclude Rosenthal stating, "I think the record before me is adequate on this, gentlemen. And I have taken into consideration the decision in Judge Crow's and it has a strong effect on my decision. That's all I'm going to say." App. Vol. V at 91-93. The district judge's written rulings and findings on these motions are reflected in the court's Memorandum and Order dated November 18, 1998, which was docketed November 19, 1998. App. Vol. III at 120.

The day after the court's rulings on the pretrial motions, the defendant entered a conditional plea of no contest to Possession with Intent to Distribute Marijuana. As part of the plea agreement, the appellant reserved the

right to appeal most of the pretrial rulings, and the government agreed to a contested sentencing hearing on the number of plants to be attributed to the defendant. The government further agreed to not oppose application of the safety valve, if deemed appropriate by the U.S. Probation Officer who authored the Presentence Investigation Report (PIR). App. Vol. III at 120.

The PIR attributed 1346 plants to Defendant, despite numerous objections by Allerheiligen. *See* App. Vol. VIII. Allerheiligen was later approved by the U.S. Probation Office for safety valve credit after submitting two written statements to the government prior to sentencing. App. Vol. III at 186. In a chambers conference before the sentencing hearing, the government then took the position that if the defendant contested the number of plants, he would not be eligible for safety valve credit. App. Vol. III at 157, 172. The Court advised counsel that it, too, would not be inclined to award safety valve credit if the defendant contested the number of plants which had been attributed to him in the Presentence Investigation Report (App. Vol. VIII, Vol III at 185-186).

In the hearing, defense counsel withdrew its objections to the Presentence Investigation Report, and offered no evidence in opposition to the 1346 plants which had been attributed to the defendant. App. Vol. VI at 3-5. The defendant was given safety valve credit and sentenced to a term of 41 months.

The defendant filed its Notice of Appeal (App. Vol. III at 168) with regard to the pretrial motions, and filed a Motion to Reconsider Rulings Made in Chambers with Regard to Sentencing Issues. App. Vol. III at 156. The

court denied defendant's motion in its Order dated 5-6-99, and the defendant then filed an Amended Notice of Appeal on May 12, 1999, to include the adverse ruling on its Motion to Reconsider. App. III at 188.

* * *